

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE.

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WESTERN TOWBOAT COMPANY,	)	CASE NO. C20-00416-RSM
	)	
Plaintiff,	)	Seattle, Washington
	)	
v.	)	July 7, 2021
	)	9:00 a.m.
VIGOR MARINE, LLC,	)	
	)	BENCH TRIAL
Defendant.	)	Vol. 5 of 5
	)	

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE RICARDO S. MARTINEZ  
CHIEF UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

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THE COURT: Good morning. Please be seated. Welcome to the 14th floor. Moving on up a floor.

I want to thank Judge Pechman for graciously allowing us to use her courtroom. I don't know if Ms. Williams has explained to you that Judge Jones has a month-long criminal trial going on, and they needed to use my courtroom, not only for jury selection, but just in case not everyone was fully vaccinated, they need to be able to social distance them instead of all being in a jury room.

We have a witness on the telephone; is that correct?

MR. BOYAJIAN: We do, Your Honor, but can I address our preliminary matter first?

THE COURT: All right.

MR. BOYAJIAN: It is our intention to try and rest today. We have four witnesses. They were here last week, but now they are -- Captain Russ Johnson is here, but other than that, they appearing by telephone today. We intend two on in the morning and two on in the afternoon.

We have a fifth witness, and Mr. Howard raised this on the first day of trial, and that's Greg Challenger.

The court issued an order on a motion in limine excluding his testimony as being veiled expert testimony. Mr. Howard raised it, but the court didn't address or give us an answer.

1 So Mr. Challenger is going to be here today and be available.

2 Vigor hired Mr. Challenger in December 2016 as a consultant  
3 on how to respond to letters we were receiving from NOAA. He  
4 has been intimately involved with first-hand personal knowledge  
5 on every decision we have made. The research vessels we hired  
6 and his own people from Polaris Applied Science attended a  
7 boardable research vessel with NOAA scientists.

8 So he has personal, firsthand knowledge about the facts in  
9 the case. Mr. Simms knows this because Mr. Simms took his fact  
10 deposition separate from expert testimony.

11 We would ask whether we would be able to put on  
12 Mr. Challenger, very carefully sticking to his fact knowledge,  
13 today, if time allows.

14 THE COURT: All right. Let me give you an answer  
15 right after the noon hour.

16 MR. BOYAJIAN: Sure, Your Honor.

17 The only reason I might -- he will be here in person, and  
18 we have two witnesses scheduled this morning. There may be  
19 dead-air time, if we get through these witnesses before the  
20 lunch hour. But I'm only telling you that for information  
21 purposes. Of course, whenever your decision is ready, that's  
22 when we'll hear it.

23 THE COURT: All right.

24 MR. SIMMS: Your Honor, as to the timing, Your Honor  
25 has ordered in limine that the experts of Vigor are limited to

1 their reports. Their reports are in the record.

2 And so as we did last time, since the reports are in the  
3 record, no direct testimony is needed from -- or should be  
4 allowed from the Vigor experts, and it should move straight to  
5 cross.

6 THE COURT: Mr. Jarrett?

7 MR. JARRETT: As I recall, that's not what we did with  
8 the witnesses who testified for Western. Both the retained  
9 experts and the non-retained experts, who testified at length  
10 last week, started with direct testimony, and we'd like to  
11 follow the same procedure today.

12 THE COURT: And we will. Again, the court is allowing  
13 greater flexibility with a bench trial, so we're allowing some  
14 of it in. But, as indicated, we do have the reports in the  
15 record. If I could just have you focus on what is probably the  
16 most important, from your perspective, put on the record now.

17 MR. JARRETT: Understood, Your Honor, and we certainly  
18 will do so.

19 THE COURT: All right.

20 MR. JARRETT: We expect -- as Mr. Boyajian said, we'll  
21 be done today, depending on the extent of cross-examination, but  
22 we fully expect to be done expeditiously.

23 THE COURT: All right.

24 So who is your first witness?

25 MR. JARRETT: Rear Admiral Tom Gilmour, who is

1 appearing by telephone.

2 THE COURT: Admiral Gilmour, are you on the line?

3 THE WITNESS: Yes, sir, I am.

4 THE COURT: Good morning. This is Judge Martinez. If  
5 I could swear you in before we get started with the questioning.

6 TOM GILMOUR,  
7 having been first duly sworn, testified as follows:

8 THE COURT: You will now be questioned, first, by the  
9 defense side, who called you, and it will be Mr. Jarrett  
10 questioning, and then that will be followed by cross-examination  
11 by counsel for Western Towboat.

12 Mr. Jarrett, you may proceed.

13 MR. JARRETT: Thank you, Your Honor.

14 DIRECT EXAMINATION

15 BY MR. JARRETT:

16 Q. Good morning, Rear Admiral Gilmour.

17 A. Good morning.

18 Q. So you heard a discussion just before you were sworn.  
19 We're not going to have you read every word from your report,  
20 sir, but I would like for you to -- well, first, can you tell us  
21 who you are and what experience and expertise you bring to your  
22 testimony today?

23 A. Yes. I will try to speak slowly and distinctly.

24 I had my file sent earlier. I would just like to elaborate  
25 on that.

1           My academic experience is four years at the Academy, where  
2 I earned a Bachelor of Science in mathematics and physics. In  
3 addition, the Coast Guard sent me to the University of Michigan  
4 for two years. I received a Master's of Science in engineering  
5 and naval architecture engineering (inaudible) also mechanical  
6 engineering.

7 Q.   Rear Admiral Gilmour, if I could interrupt you for a  
8 second. Sometimes your phone is garbled, and it cuts out. So  
9 the part that I think was garbled most recently is -- the Coast  
10 Guard sent you where, sir? Can you start there again?

11 A.   I'm sorry. I'll just start over from the beginning.

12 Q.   All right.

13 A.   I had it on speakerphone, and now it is not on  
14 speakerphone.

15 Q.   Thank you, sir.

16 A.   Is that better?

17 Q.   Yes. That is better. Thank you.

18 A.   Okay.

19           My academic experience was four years at the Coast Guard  
20 Academy, where I received a B.S. in mathematics and physics, and  
21 later the Coast Guard sent me to graduate school for two years,  
22 where I got a master's in naval architecture, marine  
23 engineering, and mechanical engineering.

24           I spent 34 years on active duty from insignia to admiral.  
25 Twenty-seven of those years were in commercial-vessel safety.

1           My last three years as a flag officer, I ran the  
2 commercial-vessel safety program for the Coast Guard as the  
3 chief of marine safety security and environmental protection.

4           I was also appointed by the State Department to represent  
5 and lead the U.S. delegation at the International Maritime  
6 Organization in London, developing international safety  
7 standards.

8           In my three years as a captain, I was also deputy of marine  
9 safety and I ran the vessel inspection, licensing, and  
10 investigation programs for the Coast Guard.

11           During these years, amongst other things, I spent six years  
12 in a partnership with the American Waterways Operators, which is  
13 a national organization for towboat operators. Together we  
14 tracked tug and barge safety, we developed voluntary safety  
15 management system for towboat operators, which later turned into  
16 regulations that are now in subchapter M for towboats.

17           During my career, I spent ten years as a commercial-vessel  
18 inspector, two years in vessel investigations and one year in  
19 Merchant Marine licensing.

20           I worked for three years as a Captain. I was Captain of  
21 the port in New York, which is the largest port -- and in charge  
22 of the Port New York, which is the largest port in the U.S. for  
23 vessel arrivals.

24           I also spent three years as the alternate captain of the  
25 port and executive officer at Marine Safety Office in San



1 Francisco Bay.

2 I had six years in commercial-vessel design review of  
3 structures and stability, and for seven years I was an IMO  
4 delegate for the Coast Guard, developing international  
5 standards.

6 Upon retirement from the Coast Guard, I worked for the  
7 American Bureau of Shipping, which is the only U.S.  
8 classification society for merchant vessels. I was, for five  
9 years, the vice president of the American division, which  
10 covered North and South America. I was in charge of steward  
11 aid, inspections, engineering design review of vessel plans to  
12 the American Bureau of Shipping standards, and I had over 1,500  
13 surveyors and 500 engineers working for me.

14 The American Bureau of Shipping verified vessel design and  
15 operations for insurance purposes, and also represented many  
16 sovereign nations, including the United States.

17 As a maritime consultant, the last few years I have worked  
18 for a shipping building company VT Falter in Mississippi for two  
19 years on a design team to develop standards for an offshore  
20 Coast Guard patrol cutter.

21 I've done a passenger vessel safety stability analysis for  
22 an operator in Portland, and I have been on retainer for Alaska  
23 Tanker Company, working on safety management systems, their  
24 ballast water management systems.

25 I've done survey on the vessel, and numerous shipwrights.

1 So I think that concludes what I have done.

2 (Technical troubleshooting takes place.)

3 THE COURT: I'm very sorry. Judge Pechman's  
4 courtroom, I forgot, has poltergeist. It always has when it  
5 comes to technical stuff. We did not have this problem in my  
6 courtroom. That's all I've got to say.

7 All right. You may continue.

8 MR. JARRETT: Thank you, Your Honor.

9 Q. (By Mr. Jarrett) Rear Admiral Gilmour, the ghosts are  
10 busted and we're ready to continue. Are you still there?

11 A. I'm still here.

12 Q. Great.

13 So you told us about your background. Did we ask you to  
14 review the materials listed in your report, sir?

15 A. To form my report, you gave me a number -- actually, about  
16 40 exhibits, and I wrote my report from those exhibits you gave  
17 to me.

18 Q. Sure. And you had the depositions of Russell Shrewsbury,  
19 Bob Shrewsbury, and Stephen McGavock, right?

20 A. I did.

21 Q. Great.

22 And is your testimony today based on your review of those  
23 materials?

24 A. Yes, it is.

25 Q. All right.

1           So just to get started here, what was the central question?  
2   What you were you asked to review? What was the question you  
3   were asked to answer?

4   A.   Well, basically, as I said at the beginning of my report, I  
5   looked at this as an investigation to determine not only the  
6   cause of the casualty but what may have contributed to the  
7   casualty.

8           I looked at all of the plans involved, all of the email  
9   exchanges, but my focus was really on the people that were  
10   operating the vessel and the written procedures that led up to  
11   the vessel leaving and proceeding down until it was lost off San  
12   Francisco Bay.

13   Q.   All right. So did you reach any conclusions as to whether  
14   proper towing plans were written?

15   A.   I did.

16   Q.   And what's your conclusion in that regard, Rear Admiral  
17   Gilmour?

18   A.   Well, let me go -- my conclusion was that the two plans  
19   written by Western Towing did not contain some key  
20   recommendations made by Bowditch Marine in their survey.

21   Q.   Go ahead, please.

22   A.   I can read sections, if you want me to.

23           But Bowditch gave a number of recommendations, one of them  
24   being -- and I'm going through my testimony here. If you go to  
25   page 3, Bowditch made a recommendation, in a letter that they

1 sent, that the master of the tug should avoid heavy head or beam  
2 seas greater than eight to ten feet. Note that the word "shall"  
3 was used here, meaning it was not optional.

4 Paragraph 7 of the recommendation is also important in that  
5 the master of the tug is not to proceed from any safe port or  
6 sheltered waters during the voyage without first determining  
7 that reasonable weather conditions less than 4-6 are predicted  
8 along his intended track.

9 Q. Rear Admiral Gilmour, if I can interrupt you.

10 You've only written one report for this case; is that  
11 right?

12 A. That's correct.

13 Q. And that report is in evidence, and I didn't intend -- I  
14 didn't ask you a very good question, sir, but I didn't intend  
15 for you to read from the report --

16 A. Okay.

17 Q. -- the court can do that as well.

18 I think --

19 A. Well, I can sum that up quickly for you.

20 Q. Okay. A summary would be great, sir.

21 A. Okay.

22 In Western's tow plan, both their original tow plan and  
23 their amendments to the tow plan, did not include, in my view,  
24 key paragraphs from the Bowditch report, which were developed by  
25 naval architects and engineers. It did not have that

1 information in their final tow plan amendments.

2 In fact, the Western tow plan amendment to the original tow  
3 plan, which allowed 15-foot seas, said, "Ideally, no more than  
4 eight- to ten-foot seas or 20- to 25-knot winds."

5 So in my view, I think if the master of the vessel had had  
6 the Bowditch information, he may have altered the route that he  
7 took, or he may have not gone at all.

8 Q. Thank you, sir.

9 Is it your opinion that the tow-plan amendment should have  
10 incorporated the towing recommendations from Bowditch?

11 A. Yes. I think both the paragraph of sea limitations and the  
12 paragraph of the recommendations of getting weather along the  
13 track not to exceed those limits was left out of the tow-plan  
14 amendments written by Western. And I think it was critical  
15 information, developed from the very people who had done  
16 engineering analysis on the dry dock and it being towed.

17 Q. Okay. And on -- let's see -- that is page 5 of your  
18 report, the middle paragraph concludes, "Had the recommendations  
19 in paragraphs 6 and 7 had been strictly followed, this casualty  
20 might have been avoided."

21 Can you expand on that? Tell us what you mean by that  
22 sentence, sir.

23 A. Well, I used the word "might" because we never know what  
24 will happen if things were changed. But I don't think --  
25 earlier in that paragraph, the eight- to ten-foot sea

1 requirements were exceeded in a number of days. They were in  
2 weather that exceeded the recommendations. So if they had  
3 followed those, they may not have been there, or they may have  
4 altered their route or slowed their speed.

5 Q. To avoid the weather?

6 A. To avoid the weather, yes.

7 Q. Is there any further explanation you want to add for any of  
8 the conclusions you reached in your report? Keep in mind, sir,  
9 that I'm only referring to the opinions referenced in your  
10 report, not opinions you have reached otherwise.

11 A. Yeah. The only other conclusion that I made of note, that  
12 I think the master of the vessel, as the vessel was sinking off  
13 of San Francisco Bay as he headed south, was just inside the  
14 sanctuary, the Monterey Bay Sanctuary, and if he had known  
15 exactly where he was, he should have been outside of the  
16 sanctuary.

17 I think the sanctuary should have been avoided at all  
18 costs, but there was a lot going on that night --

19 Q. Thank you.

20 A. -- indeed.

21 Q. All right. I interrupted you, Rear Admiral Gilmour,  
22 because those issues are not in front of the court for this  
23 trial anymore.

24 A. Oh, okay.

25 Q. Those are the questions I have for you, sir. So there will

1 be some cross-examination by counsel for Western, so hang on.

2 THE WITNESS: Okay.

3 CROSS-EXAMINATION

4 BY MR. SIMMS:

5 Q. Good morning, Admiral Gilmour. This is Steve Simms. We  
6 had a chance to Zoom together with the *Eagle* in the background,  
7 the Coast Guard flagship.

8 A. Yes, sir.

9 Q. Yes, sir.

10 You have your report in front of you, correct?

11 A. Uh-huh.

12 Q. Okay. Do you have anything else in front of you? Any  
13 notes or anything like that?

14 A. I've got a whole lot of things in front of me.

15 Q. Do you have a copy of the transcript of your deposition?

16 A. I do not.

17 Q. Did you receive a copy of the transcript of your  
18 deposition?

19 A. I did not.

20 Q. All right.

21 So your report assumed that the Coast Guard had not  
22 approved the tow plan; is that correct?

23 A. That is correct.

24 The Coast Guard where?

25 Q. The -- yes. The Coast Guard where? Coast Guard Seattle.

1 A. Okay. All right.

2 Yes, that is my assumption.

3 Q. Yes, but your assumption was wrong, because the Coast Guard  
4 did approve the dead-ship tow plan, correct?

5 A. Perhaps verbally. I don't know that information. I don't  
6 know if they had a written approval.

7 Q. That was in the Coast Guard investigation report that you  
8 reviewed during your deposition, wasn't it, confirming that the  
9 Coast Guard approved the plan?

10 A. It said that Seattle had --

11 THE COURT: Admiral, hang on one second. This is  
12 Judge Martinez. Is there an objection?

13 MR. JARRETT: Is there a page he can reference so he  
14 can look at and see -- is he being impeached with this  
15 deposition testimony? I don't know the basis --

16 MR. SIMMS: I'm asking the question --

17 THE COURT: Hang on, Mr. Simms.

18 Admiral Gilmour, you do not have a copy of your deposition  
19 in front of you?

20 THE WITNESS: I do not.

21 THE COURT: Then the way we will do this is as  
22 follows:

23 Mr. Simms will indicate the page number and line number, if  
24 there's going to be a question that connects to the deposition  
25 so that defense counsel are also looking at the same exact



1 thing. And I'm sorry you don't have one, because that would  
2 probably make it a little easier for you.

3 So let me have Mr. Simms indicate if he, in fact, going to  
4 use the deposition for impeachment. Mr. Simms?

5 Q. (By Mr. Simms) First I want to ask, Captain, did you see  
6 the Coast Guard Information Exchange report summarizing the  
7 information?

8 A. I'm not sure what you're referring to.

9 Q. Okay. All right.

10 This is at transcript page 30, line -- we'll go back to --  
11 gosh, there's a lot of stuff that gets into this, but we'll go  
12 back to page 29. My question, at line 2: "And Exhibit 2, and  
13 you are -- you are familiar with this, right? The Coast Guard's  
14 Maritime Information Exchange, which is online? This is what  
15 I've marked as Exhibit 2 and this is -- this is a summary --  
16 this is familiar to you, this format and this -- this source,  
17 right?"

18 Your answer --

19 A. Are you referring to the 160-some page investigation report  
20 from San Francisco?

21 Q. I'll refer to that, too, because that is -- and you saw  
22 that report, didn't you?

23 A. Yes.

24 Q. All right. So there is a summary on the publicly available  
25 Coast Guard Information Exchange of that investigation report,

1 correct?

2 A. There is.

3 Q. All right. And both the summary and the report say that  
4 the Coast Guard approved the dead ship tow, correct?

5 A. Yes.

6 Q. All right. Your report assumed that the Coast Guard had  
7 not approved the dead ship tow.

8 A. I guess what I would say is, I saw -- at that point in my  
9 testimony, I saw no written approval from the Coast Guard in  
10 Seattle of the tow report, or the tow -- yes, of the tow report.

11 But I did note that the Coast Guard had verbally approved  
12 the tow to go. But I had seen no written plan, at that point,  
13 when I wrote my summary.

14 Q. Yes.

15 A. Since then, I have seen an email exchange, from the Coast  
16 Guard in Seattle, with a number of people, and know that they  
17 did receive the Bowditch report that said eight- to ten-foot  
18 seas, a restriction. The Coast Guard did receive that report.

19 And I don't know what they base their approval on. My  
20 assumption was that they based their approval on the fact that  
21 they knew Western Towing, and they knew that Bowditch was a  
22 reputable marine surveyor. And, in fact, they got the plan as  
23 the vessel was leaving.

24 So the only thing that the Coast Guard in Seattle saw was  
25 the Bowditch report that had the eight- to ten-foot sea

1 requirement in it.

2 Q. Okay.

3 A. And also the weather reporting.

4 And I can refer to the things that I saw when I was up in  
5 Seattle, waiting for testimony.

6 Q. Uh-huh. Okay. All right. Well, the record will show that  
7 that assumption is not correct.

8 A. Which assumption?

9 Q. Your assumption that all the Coast Guard saw was Bowditch's  
10 report and something about the weather.

11 A. Yes. I had not seen the actual email exchange with the  
12 Seattle Coast Guard until this past week, either on Monday or  
13 Tuesday, when I was up in Seattle waiting to testify.

14 Q. Okay. All right. So --

15 A. I did not have that information when I wrote my report.

16 Q. Okay. Let's move on to another of your assumptions.

17 You assume that a structural analysis was done of the YFD  
18 70 as part of the Bowditch report; is that correct?

19 A. No, that is not correct.

20 Q. Okay. All right.

21 Well, a structural analysis should be done, shouldn't it,  
22 before a tow such as this one?

23 A. I think some sort of structural analysis probably should be  
24 done.

25 But I do know that the underwriter for the tow and that

1 Mr. Shaw from Bowditch had an email exchange. They were -- they  
2 questioned the 15-foot seas that were in the original tow plan,  
3 and then came up with their recommendations later. Exactly what  
4 they did, I do not know. I just -- I gleaned that information  
5 from an email exchange.

6 Q. Okay. All right.

7 And so your belief was that was a structural analysis?

8 A. I'm assuming they considered the structure of the dry dock  
9 when they changed it from 15-foot seas to eight- to ten-foot  
10 seas, yes.

11 Q. Now, is that a sufficient structural analysis for a tow  
12 such as this one?

13 MR. JARRETT: Objection, Your Honor. There is no  
14 foundation for that question. Rear Admiral Gilmour just stated  
15 he saw what he saw. He did not see the basis of the analysis.

16 THE COURT: The objection will be sustained.

17 Q. (By Mr. Simms) Is a wasting analysis important for a tow  
18 such as this one?

19 MR. JARRETT: Objection, Your Honor. That's beyond  
20 the scope of Rear Admiral Gilmour's report. He did not touch on  
21 a wasting analysis, whatever counsel means to refer to by that  
22 question.

23 MR. SIMMS: He did. He 's talking about a structural  
24 analysis that he saw. He says that Bowditch's report was the  
25 be-all and end-all of this tow. I want to know whether it was

1 or not.

2 THE COURT: All right. I'll give you a little bit of  
3 latitude. Overruled.

4 Q. (By Mr. Simms) Was a wastage analysis an important part of  
5 concluding -- Bowditch -- that the vessel was seaworthy?

6 A. I would assume that Mr. Shaw, from Bowditch, when he did  
7 the survey of the vessel, looked at all structural members,  
8 including any wastage, and he should have so noted.

9 Q. All right. And so just to go back to that question.  
10 Was it an important thing to do for Bowditch to determine  
11 wastage of the YFD 70?

12 A. Wastage would be part of the survey, as well as damage to  
13 any internal structures. You know, there's a number of things a  
14 surveyor would look at, but wastage would be -- if there was  
15 severe wastage somewhere, it would be considered in whatever he  
16 did.

17 Q. Okay. But you can't determine wastage just visually, can  
18 you?

19 MR. JARRETT: Objection, Your Honor. Rear Admiral  
20 Gilmour is not presented as a wastage-analysis expert, not at  
21 all.

22 THE COURT: Sustained.

23 Next question, Mr. Simms.

24 Q. (By Mr. Simms) So the Western tow plan, it was not any  
25 less detailed than plans you're familiar with, correct?

1 A. I'm sorry. Would you repeat that question again?

2 Q. Are most of the tow plans you've reviewed of the detail of  
3 Western's tow plan?

4 A. Of Western's tow plan?

5 Q. Correct.

6 A. I'm -- I'm -- could you ask the question in a different  
7 way? I'm not sure what you're after.

8 Q. Have you reviewed tow plans before?

9 A. I have.

10 Q. All right. Was Western's plan of the same detail of most  
11 of the plans you reviewed?

12 MR. JARRETT: Objection, Your Honor. The question is  
13 ambiguous in that there are several plans in evidence.

14 THE COURT: Sustained.

15 Q. (By Mr. Simms) Okay. Let's look at the first plan.

16 Was that plan of the detail of most plans you've reviewed,  
17 the first plan, the unamended one?

18 A. The unamended Western tow plan?

19 Q. Yes.

20 A. Is that what you're asking me to comment on?

21 Q. Yes.

22 A. Okay.

23 In my statement, I said the original plan -- which I assume  
24 is the one you want me to talk to -- which I assume was produced  
25 by Western Towing -- gave no wind restrictions or -- and a

1 restriction of 15-foot seas. It also gave a speed of five to  
2 six knots, which seemed a little excessive to me.

3 My assumption was that this plan was taken from a more  
4 standard tow as a placeholder; for a later plan to be developed  
5 after the dry dock was surveyed and completed.

6 Q. Just to stop you there, do you have any basis for that  
7 assumption that it was a placeholder?

8 A. Yes. Because it had no detail as to the tow itself. So  
9 that's what I made my assumption on.

10 Q. Okay. Let's go to your transcript, page 7, and then we'll  
11 continue onto 9.

12 I ask, at 7, line 20: "Were the tow plans that you  
13 reviewed plans for dead ship tows?"

14 Twenty-two: Answer: Some. I have done dead ship tows  
15 before, yes."

16 Twenty-four, on page 7: "Okay. And let's focus on dead  
17 ship tows.

18 "Have you ever reviewed a tow plan for a dead ship tow that  
19 contained the detail that -- that your opinion says Western  
20 should have submitted?"

21 Your answer, line 4, page 8: "Well, you're making me  
22 recall things from a long time ago. Actually, I think Western's  
23 tow plan was a fairly standard tow plan, and so, yes, certainly  
24 the detail of that, of sea heights, winds, actual local areas  
25 they were going to report from, communications, the fact that

1 they had pollution-response equipment, et cetera, et cetera, so,  
2 yes, I would say most of the plans I reviewed were of the detail  
3 of Western plans.

4 "And I would add, too, that I have investigated a number of  
5 collisions of towboats, going way back, where tow plans were in  
6 question and much of the information in the tow plan was in  
7 question. So I guess I'm speaking now of just the ones that I  
8 approved."

9 Then my question at line 20, page 8: "And so we will -- we  
10 will move to the investigations you were involved in. Have  
11 you -- have you -- have you seen a tow plan as part of those  
12 investigations that contain the detail that your opinion says  
13 Western should have contained?"

14 Page 9, your answer at line 1: "As I said, most tow plans  
15 I have looked at are with a similar detail of Western's tow  
16 plan."

17 Your testimony there was correct, wasn't it?

18 A. Well, I -- obviously, that's what I said. And I guess I  
19 would like to elaborate a little bit.

20 The original Western tow plan, I'm assuming, came from the  
21 tows they make up and down the coast of standard tows of large  
22 or shipshape vessels, and it had all of the information that I  
23 said in my deposition in it.

24 But in this case, this was a very nonstandard tow. So I  
25 would expect more detail of the tow itself, such that was



1 contained in Bowditch's notes, or the Bowditch letter that I  
2 referred to in my report. This was not in any way a standard  
3 tow, and most of the tow plans I have looked at were standard  
4 tows.

5 Q. Okay. All right.

6 So your report also assumes that Western had in hand the  
7 final Bowditch report and recommendations, correct?

8 A. It did.

9 Q. And that was in hand before the departure of the tow,  
10 correct?

11 A. I wouldn't -- I don't know exactly when and where the  
12 Bowditch plan was given to Western Towboat, but because the  
13 Western tow plan amendment had the term "ideally no more than  
14 eight- to ten-foot seas and 20- to 25-knots of wind," I assume  
15 that came from the Bowditch report. That's the only mention of  
16 eight- to ten-foot seas, which was only contained in the  
17 Bowditch report.

18 So my assumption was, when Western Towing made the tow-plan  
19 amendments for the YFD 70, they had seen the Bowditch report.

20 Q. Okay. And is that the final report? That's your  
21 assumption?

22 A. I'm not sure what you're referring to in "the final  
23 report."

24 Q. Well, a report that was the final Bowditch report. That's  
25 what you had in mind, wasn't it?

1 A. Yeah, but those eight- to ten-foot seas and the weather  
2 tracking of the proposed way down to San Francisco was contained  
3 in numerous places, three or four references had the same two  
4 paragraphs in it, and more in both the Bowditch report, three or  
5 four exhibits, and the report that was sent to the Seattle Coast  
6 Guard, which I assumed they based their approval on, also had  
7 the same two paragraphs in the survey report that went from Dan  
8 Keen to the Coast Guard in Seattle. So it wasn't just in one  
9 report that the restrictions occurred.

10 Q. Okay.

11 And you have never had any involvement before this case  
12 with a YFD class dry dock, have you?

13 A. No, I have not.

14 Q. And you have found, though, that the *Navy Towing Manual* is  
15 a reliable source?

16 A. I would not comment on that, but if the Navy has a tow  
17 plan, I'm sure some thought went into it.

18 Q. Uh-huh. Okay.

19 All right. This is your transcript at 25, line 9. My  
20 question: "Is that -- is the *Navy Tow Plan* a reliable source to  
21 determine standards for towing dead ship tows?"

22 Your answer, line 12: "I -- I would think it would be a  
23 resource, and hopefully, if the Navy is using it, it is a  
24 reliable source, yes."

25 Is that correct testimony?

1 A. Yeah, absolutely.

2 Q. All right.

3 So you talked about altered weight and speed. I think that  
4 went to the awareness in the marine sanctuary.

5 MR. SIMMS: And so I'd ask the court not to consider  
6 that testimony, or, otherwise, I'll cross-examine.

7 He was talking about the rate of the speed of the tug not  
8 altered.

9 THE COURT: No, we don't need any testimony about  
10 that.

11 MR. SIMMS: All right. Got it.

12 All right. Thank you, Admiral.

13 And the phone sounds great.

14 THE COURT: There may be additional questioning from  
15 Mr. Jarrett.

16 MR. JARRETT: Briefly, Your Honor. Thank you.

17 REDIRECT EXAMINATION

18 BY MR. JARRETT:

19 Q. Rear Admiral Gilmour, Mr. Simms asked you about Coast Guard  
20 approval for the tow to leave Seattle, and you testified that  
21 you assumed the Coast Guard had, at least, verbally approved  
22 that departure. Do you remember that?

23 A. Yes.

24 Q. Do you quibble with the Coast Guard's approval of this tow,  
25 Rear Admiral Gilmour? Do you think that was wrong?

1 A. You know, based on what they had, I think the Coast Guard  
2 did the right thing in that they ensured that there was a  
3 reputable towing company that was insured, had the proper  
4 pollution prevention, et cetera, et cetera. And when they saw  
5 that they had a reputable surveyor, they probably felt pretty  
6 good about it. And, indeed, in the email exchange that I saw  
7 when I was up in Seattle, the Coast Guard did ask for a survey  
8 report, which was given to them as the vessel was leaving.

9 So I think they were probably satisfied with what they had.  
10 I don't think they did a detailed review, however, of the survey  
11 report.

12 Q. Thank you, sir.

13 And just, finally, in all your time with the Coast Guard,  
14 and since, even, have you come to view Coast Guard approval as a  
15 substitute or an excuse for the exercise of reasonable  
16 seamanship?

17 A. I'll just -- I'll say this: Coast Guard and federal  
18 requirements are minimal requirements. The safety management of  
19 the company, in my view, the good companies go well beyond any  
20 Coast Guard requirements.

21 So the Coast Guard probably approves a whole bunch of  
22 things that maybe they should, in hindsight, take a better look  
23 at.

24 But, again, Coast Guard requirements are minimum  
25 requirements for safety.

1 MR. JARRETT: Thank you, Rear Admiral Gilmour. I  
2 don't have anything further for you. Mr. Simms may have  
3 questions.

4 MR. SIMMS: Thank you, Admiral. No questions from me,  
5 and thank you for your testimony.

6 THE COURT: All right. Thank you.

7 THE WITNESS: You're welcome.

8 THE COURT: Your next witness, counsel?

9 MR. JARRETT: Vigor calls Captain Russ Johnson, Your  
10 Honor.

11 THE COURT: Captain, good morning. If I could have  
12 you work your way up before our clerk to be sworn prior to  
13 testifying, sir.

14 RUSSELL JOHNSON,  
15 having been first duly sworn, testified as follows:

16 MR. SIMMS: Your Honor, before we start, I think we're  
17 moving along. If the Vigor side can get its witnesses in here,  
18 we can use the time well.

19 THE COURT: Okay.

20 MR. JARRETT: Thanks for that, counsel.

21 Our witnesses are not available until after the lunch  
22 break, as Mr. Boyajian referenced, unless Greg Challenger  
23 testifies.

24 THE CLERK: Please state your name for the record, and  
25 spell your last name for the court reporter.

1 THE WITNESS: Robert Russell Johnson, J-o-h-n-s-o-n.

2 THE COURT: Captain, I think you may have heard the  
3 admonitions I gave other witnesses. I'm not sure if I saw you  
4 in the courtroom or not previously.

5 THE WITNESS: Not before today. This is my first day  
6 here.

7 THE COURT: All right. Listen carefully to counsel's  
8 questions, don't speak over them, and if you don't understand  
9 them, just say so, and we'll get them to rephrase.

10 You may inquire.

11 DIRECT EXAMINATION

12 BY MR. JARRETT:

13 Q. Captain Johnson, we're going to -- your report -- you've  
14 only written one report in this case; is that right?

15 A. That's correct.

16 Q. That report is in evidence as well, so, by all means, feel  
17 free to refer to your copy of your report, but we really do not  
18 need to read any of the language from it. We're not reading it,  
19 verbatim, into the record. Do you understand?

20 A. Understood.

21 Q. Great.

22 So can you summarize, a thumbnail sketch, of your  
23 background and experience, and what gives you the basis for your  
24 knowledge of ocean towing on the West Coast?

25 A. Well, I started my career in 1966. I followed my father

1 over to Vietnam. He was a captain of a tugboat and working for  
2 a company in Vietnam, an American company that towed supplies  
3 for the military.

4 I, unfortunately, had just dropped out of college at  
5 Seattle University, up the street here, and I was a little  
6 wayward.

7 I went over there in '66, and I was there until, I think it  
8 was late 1970, so almost four years, four years, something like  
9 that.

10 I was fortunate enough to get my first captains job over  
11 there when I was still not yet 21 years old. Just circumstances  
12 of the war at the time.

13 I came back in 1970, and I received my First Master's  
14 license in 1971. It was 1,000-ton Master's license, ocean  
15 freight and towing, and that's the license that I have today.

16 I believe I was probably -- I was told I was the youngest  
17 captain to receive 1,000-ton Master's license at that time.

18 I worked on the West Coast for a number of years for Alaska  
19 Tug & Barge, also known as AT&B, which was later bought out by  
20 Crowley Maritime, a very large -- one -- at the time, one of the  
21 largest towboat companies in the world, and I was a captain for  
22 them for a number of years.

23 In 1983, I was asked by Crowley management to come into the  
24 office as a port captain. And in 1984, I was transferred to San  
25 Francisco as the operations manager for San Francisco and for

1 outside operations on the West Coast.

2 In 1990, I was transferred back up to Seattle and promoted  
3 to marine operations manager for the West Coast and Alaska for  
4 Crowley Maritime, where I was responsible for over 100 tugs and  
5 barges in the Crowley system, for not only their safe operation,  
6 but their routes and their route plannings.

7 I left Crowley in 1994 to go back to sea, and I operated up  
8 and down the West Coast for a company called Dunlap Towing  
9 Company. The West Coast and Alaska were my routes, as well as  
10 Hawaii and return.

11 And at some time later, in 2000, I was asked to come ashore  
12 by Dunlap, to a shoreside post, helping to manage marine  
13 operations, as well as the safety manager for the company.

14 At Dunlap, I was responsible for -- integrated the  
15 international safety management system that the company now  
16 operates on and was necessary to operate over 200 miles  
17 offshore.

18 And I continued that career with Dunlap until -- I guess it  
19 was 2010, when I retired.

20 Since then, I have been active in my expert witness  
21 business and a marine consultant in various projects.

22 Q. Thank you, Captain Johnson.

23 During your experience with Crowley and/or Dunlap, did you  
24 have experience managing the fleet; that is, conferring with the  
25 company about contracts that it was undertaking, managing the



1 company's vessels, dispatching various vessels to various  
2 contracts, that kind of thing?

3 A. Yes. At Crowley, I approved all tows, and I approved the  
4 contracts that the guys that were doing the contracts and the  
5 company were arranging at the time, and assigned the proper tugs  
6 and barges to the project.

7 And at Dunlap Towing Company, I was very active in doing  
8 the contracting. I'd bid the tows, bid the jobs, and contracted  
9 with the carriers -- I'm sorry -- the shippers.

10 Q. Sure.

11 Did we ask you to review documents and depositions for  
12 purposes of reaching opinions in this case, Captain Johnson?

13 A. Yes, you did.

14 Q. Those are listed in your report; is that right?

15 A. That's correct.

16 MR. JARRETT: Just for the record, for our reference  
17 later, Captain Johnson's report is marked as Exhibit A-35.

18 Q. (By Mr. Jarrett) So moving into the opinions in that  
19 report, Captain Johnson, again, I don't think that we need to --  
20 well, I know we don't need to go through the report  
21 line-by-line, but there are a couple of your opinions that could  
22 bear some further explanation.

23 So do you have your report in front of you, sir, your copy  
24 of it?

25 A. Yes, I do.

1 Q. So keeping in mind -- if you are going to read anything,  
2 you need to keep in mind that it is being transcribed, so you  
3 need to read at a conversational pace and not an out-loud  
4 reading pace. Do you follow me?

5 All right. So, Captain Johnson, referring to the opinion  
6 section of your report, which starts at the top of page 9, do  
7 you see it there, sir?

8 A. Yes, I am.

9 Q. All right. So your sentence is that the lump sum towage  
10 contract for the YFD 70 for a voyage on the West Coast during  
11 mid October was risky.

12 Can you tell us what you mean by that sentence, sir?

13 A. Well, there is a number of factors to consider when I say  
14 "risky." First of all, it was the nature of the tow, which was  
15 not an oceangoing barge; it was a dry dock, and a 70-year-old  
16 dry dock, to boot. So, obviously, special care would have to be  
17 considered for towing it down the coast at that time.

18 Secondly, the restrictions that were put on the tow by the  
19 surveyor of eight- to ten-foot seas and 20- to 25-knot winds is  
20 pretty confining, in the aspect that the month of October could  
21 more than likely have stronger winds and heavier seas on the way  
22 down the coast of the United States at that particular time of  
23 the year.

24 October is notoriously unpredictable, and even into  
25 November, so that's -- that's why I say it's a little bit risky.

1           And the other part of that is that it is a lump-sum tow,  
2 meaning that the company was being paid a fixed amount of money  
3 regardless of how long the tow took to go down the coast. And  
4 in my position as a manager, I'm thinking, well, you know, I  
5 likely might exceed the amount that I'm receiving for that bid,  
6 because of weather conditions, holding up for weather in the  
7 Strait of Juan de Fuca, or slowing down to a couple of knots, or  
8 one knot or zero knots, to avoid weather.

9           So if you add all those up, it was a risky tow. And it's  
10 probably a tow that I personally would not have authorized or  
11 booked at that particular time.

12           You can -- I believe they had the ability to -- with Vigor,  
13 and Vigor agreed that they could tow it any time they wanted to.  
14 They didn't have to necessarily leave in October. If they would  
15 have left in May or June of the following year, they would  
16 likely have a good weather window to operate on, much more  
17 likely than in October. So that's probably what I would have  
18 decided to do.

19 Q.   All right. So would it have been more prudent to wait  
20 until spring to undertake this tow, Captain Johnson?

21 A.   I believe so, yes.

22 Q.   So conversely, was it prudent to undertake this voyage in  
23 mid to late October?

24 A.   As an operations manager, I don't believe it was prudent to  
25 take it on at that time.

1 Q. Okay.

2 Some terms that you used are not necessarily familiar to  
3 me. You said that this tow would proceed outside. What does  
4 "outside" mean in your parlance, Captain Johnson?

5 A. I'm sorry. Say that again.

6 Q. Yeah.

7 So you said when you get outside, you encounter weather.  
8 Outside of -- go ahead. Outside of Puget Sound, is that what  
9 you meant?

10 A. I would be referring to shorthand for going into the ocean.  
11 It's a 124 miles from Seattle to Cape Flattery, where you have  
12 relatively calm seas and relatively calm winds. And once you  
13 get past Cape Flattery, then you're into the open ocean for  
14 8,000 miles across the Pacific. That's what I mean by  
15 "outside" --

16 Q. Okay.

17 A. -- outside Cape Flattery in the open ocean, Pacific Ocean.

18 Q. Okay. Great.

19 Opinion No. 3 in your report, on page 9, you -- the  
20 conclusion is Captain McGavock and Western Towboat management  
21 were in the most important -- sorry. I'll start again.

22 A. Are you saying No. 3?

23 Q. Yes. I'm just reading the conclusion so we're on the same  
24 page.

25 Starting again.

1 "Captain McGavock and Western Towboat management were in  
2 violation of the most important basic tenets of the  
3 tow-suitability survey."

4 Can you explain that for us, sir? What are those most  
5 important basic tenets, and how were they violated, in your  
6 opinion?

7 A. I'm sorry, but my opinions aren't tracking with yours.  
8 My No. 3 starts out, "The trip tow recommendations from the  
9 surveyor stated that the master of the *Ocean Ranger* is not to  
10 proceed."

11 Q. That's the one, Captain. I was reading from the last  
12 sentence of that paragraph.

13 A. Okay. I gotcha. Okay.

14 "Captain McGavock and Western Towboat management were in  
15 violation of the most important basic tenets of the  
16 tow-suitability survey."

17 Well, yeah, they -- they were not in -- they were -- two  
18 days out from leaving Cape Flattery, they were already into  
19 winds that were in excess of the recommended parameters of the  
20 surveyor.

21 And I believe that Bob Shrewsbury had information  
22 indicating that they would be going into a weather system a  
23 couple of days out that likely would exceed the parameters of  
24 the surveyor. They did, indeed, encounter that weather a couple  
25 of days out, and they did take some pretty heavy weather, which

1 was not on the recommendations of the surveyor.

2 Q. Thank you, Captain Johnson.

3 Do you have any opinions as to the reasonableness with  
4 which Captain McGavock conducted the tow down the coast, the  
5 speed that he maintained and the vessel's engines, the way that  
6 he maneuvered, anything like that to avoid weather? Did you  
7 reach any opinions in that regard, sir?

8 A. I believe that there was a couple of -- maybe numerous  
9 different times where, I believe, that he was towing too hard  
10 for the conditions that they were encountering at the time.

11 There was mostly southeast, southerly, and southwesterly  
12 winds, which they were taking right on the bow of the dry dock,  
13 and there was a lot of slamming going on. And remembering that  
14 this is a blunt-nosed instrument of a craft, and they're taking  
15 these seas directly, slamming into that craft.

16 And just from my experience, towing at 3, 4, 5 knots into  
17 eight- to ten-foot seas, even a regular cargo barge can cause  
18 significant damage. With a tow of this type, I think it was  
19 certainly not advisable, and they should have been slowing down.  
20 I believe that that was a big issue in the damage to the dry  
21 dock.

22 Q. Thank you, sir.

23 And was that contrary to any recommendations from the  
24 tow-suitability surveyor?

25 A. Well, absolutely. It was eight- to ten-foot seas, and they

1 shouldn't have been in it in the first place.

2 Q. So those recommendations from the tow-suitability surveyor,  
3 should those be viewed as requirements for the tow, in your  
4 view, Captain Johnson?

5 A. I believe that they can be reviewed -- I mean, understood  
6 as requirements for the tow. But I just don't think it's  
7 reasonably attainable to have those restrictions in that time of  
8 year and accepting to take that tow down the coast.

9 Q. Okay.

10 As the manager of any of the entities that you've worked  
11 for, or as the skipper of any towboat that you've operated, do  
12 you rely on the customer to tell you what the weather conditions  
13 are and what the forecasts and what waves, seas, and winds  
14 you're going to encounter?

15 A. Certainly not. No, we have our own methods of checking the  
16 weather, and we do not rely on the customer to dictate to us  
17 what the weather is going to be or provide us any information.

18 Q. Sure. And I think I know the answer to this, but who has  
19 the final say as to whether a towboat will depart or whether a  
20 towboat will continue into the conditions it's encountering?

21 MR. SIMMS: Can we have a reference in the report to  
22 that?

23 MR. JARRETT: That's fair. I'll strike that question.  
24 I'll withdraw it.

25 Q. (By Mr. Jarrett) Captain Johnson, is there any of the

1 opinions in your report that you think -- you think require  
2 further explanation to us this morning?

3 A. I don't think so, but I'll be glad to provide them, if  
4 necessary.

5 MR. JARRETT: Thank you, sir. Mr. Simms will likely  
6 have some questions for you.

7 CROSS-EXAMINATION

8 BY MR. SIMMS:

9 Q. Was this an open-ocean tow?

10 A. I would consider it an open-ocean tow, yes.

11 Q. So let's talk about your experience with open-ocean tows.  
12 You had an experience with a barge going from Oregon to Hawaii  
13 that had some trouble, right?

14 A. Yes. I believe you're referring to a tow that I was  
15 questioned about in my deposition.

16 Q. Yes, that one.

17 A. Technically, it was from Seattle to Hawaii.

18 Q. Seattle to Hawaii. And the tow experienced heavy weather  
19 around the Oregon Coast?

20 A. Yeah, about 80 to 100 miles off the Oregon Coast.

21 Q. And that was weather that you hadn't foreseen?

22 A. That was -- I really don't recall. It was so long, long  
23 time ago, 35 years ago.

24 Q. And tell the court what happened with the tow.

25 A. Well, it certainly wasn't anticipated to be this rough. It



1 turned out to probably be the worst weather that I've ever  
2 encountered in my career. We had up to 100 mile-an-hour winds  
3 and 40-foot seas.

4 We were slowed down to, actually, no way through the water,  
5 and at times going backwards during a 24- to 36-hour period of  
6 time. And after the storm moved through, we continued our trip  
7 to Hawaii.

8 Q. And there was a problem with the barge, right?

9 A. Yes, there was a problem with the barge.

10 Q. Well, what happened?

11 A. A couple days later, we noticed that there was a slight  
12 list on the barge. And we didn't know the reason for it at the  
13 time. But, at any rate, we continued on, and it got worse at  
14 some point, and we took a substantial list, 30-, 35-degree list.  
15 And it was a container barge, and we were dumping numerous  
16 containers over the side on our way to Hawaii. We ended up  
17 going into Honolulu with 80 percent of our cargo gone.

18 Q. During that tow, did you talk with a marine architect?

19 A. I did not personally.

20 Q. Did somebody at your office talk with a marine architect  
21 about the listing?

22 MR. JARRETT: Objection, Your Honor. This is well  
23 outside the confines of Captain Johnson's report and his direct  
24 testimony.

25 THE COURT: Sustained.

1 MR. SIMMS: Okay.

2 Q. (By Mr. Simms) So back in your report -- this is paragraph  
3 12 -- you talk about Captain McGavock says in his statement  
4 that, at some point, because of rapidly deteriorating condition  
5 of the dry dock, it became apparent that the tow would not make  
6 it.

7 Okay. So that's at paragraph 12?

8 If you had been Captain McGavock, would you have consulted,  
9 either through your office or directly, with the marine  
10 architect familiar with the tow?

11 MR. JARRETT: Objection, Your Honor. This testimony  
12 has already been found by the court to be outside of the issues  
13 we're considering this week during trial. It's been decided on  
14 summary judgment.

15 MR. SIMMS: It is not. It goes directly to  
16 contributory negligence, to comparative negligence, absolutely  
17 directly.

18 THE COURT: Overruled. You may answer.

19 THE WITNESS: Would you repeat the question?

20 Q. (By Mr. Simms) Sure.

21 If you were in Captain McGavock's position, would you have  
22 consulted, directly or through the marine architect, about this  
23 situation of the tow, the makeup of the tow, its capabilities?

24 A. I would have certainly been, you know, consulting with  
25 operations management at my company, yes.

1 Q. Okay. Is that what you did with your tow across to Hawaii?

2 A. Yes.

3 Q. And without doing that, you never would know whether the  
4 tow would sink or not, right?

5 A. Well, they -- you know, I'm presuming that the office,  
6 through whatever consultation that they're having, has access to  
7 information that I might not have.

8 Although we do try to provide our captains with all of the  
9 detail of the tows, as much as we can, we might not have all of  
10 the calculations necessary to figure out if a barge is going to  
11 flip over or if it's not going to flip over.

12 Q. And when this barge flipped over, that was an emergency  
13 situation, wasn't it, the YFD 70?

14 MR. JARRETT: Objection, Your Honor. Emergency  
15 situation is not defined in the question or otherwise, and that  
16 is not relevant to this case, either.

17 THE COURT: The objection to the form will be  
18 sustained.

19 MR. SIMMS: Okay.

20 Q. (By Mr. Simms) You talked about, in your direct testimony,  
21 the flipping over of the tow here, the 70. Was that an  
22 emergency situation?

23 MR. JARRETT: Again, Your Honor, objection. That's  
24 beyond the scope of his direct testimony. We did not talk about  
25 that at all.

1 THE COURT: That's sustained.

2 Q. (By Mr. Simms) So in your experience -- Captain McGavock  
3 has this tow, he sees the listing -- would you have been able to  
4 know for certain, by viewing the tow -- and let's look at --  
5 let's talk about the tow you've experienced -- could you, by  
6 observing your tow, know for certain that it was going to sink?

7 MR. JARRETT: Objection, Your Honor. The hypothetical  
8 that Mr. Simms proposed is neither complete nor unambiguous.

9 THE COURT: And there is no way for him to answer that  
10 particular question with the information that he had.

11 Sustained.

12 MR. SIMMS: Okay. All right.

13 Q. (By Mr. Simms) I want to talk about your experience. You  
14 were going across the Pacific with a tow that was listing. All  
15 right? And you're looking back at the tow. Okay?

16 Could you, by looking at that tow -- just looking at it --  
17 on your own determine -- tell that it was going to sink?

18 MR. JARRETT: Objection, Your Honor, this is, again,  
19 not --

20 THE COURT: Yes. Mr. Simms, we need to move on to a  
21 different area. The question did not make sense. There's no  
22 way he can answer it, given the information that he had. It's  
23 great argument, though.

24 MR. SIMMS: I'm trying to get to his experience. He  
25 has a comment here about rapidly deteriorating condition, that

1 it became apparent that the tow would not make it, and we've  
2 already heard his testimony that he connected back to the office  
3 and talked with a marine architect.

4 THE COURT: No, I understand that's in his report.  
5 That's a great argument you can make to the court, but there's  
6 no way anybody can look at this and decide, oh, yeah, it's  
7 sinking, it's not sinking. We already have that in from  
8 Mr. Keen, from his testimony.

9 MR. SIMMS: This is one thing we haven't done all this  
10 time. We have never seen a picture of the 90. So we're going  
11 to see a picture of it.

12 Q. (By Mr. Simms) So while I'm putting this up, what do you  
13 know of the *Ocean Ranger*; its horsepower, its capabilities, that  
14 sort of thing?

15 A. I believe it's one of their class of tugs that they've been  
16 building for quite some time. I have not been aboard it myself.  
17 I believe I've seen the specs on it before. But other than  
18 that, I've not been aboard it.

19 Q. Okay. All right.

20 Here it is. Okay.

21 So you were, in your report, talking about the maximum R PM  
22 of the *Ranger*.

23 MR. JARRETT: Your Honor, the document that's being  
24 displayed to the court is not an exhibit. It's not in anything  
25 that we sent to Captain Johnson for review.

1 MR. SIMMS: This is rebuttal.

2 MR. JARRETT: I don't understand --

3 THE COURT: All right. I don't have a question in  
4 front of me. What are you going to ask him about this document?

5 Q. (By Mr. Simms) So, in your opinion, paragraph 3, you said  
6 that the *Ocean Ranger* towed at a near maximum power at 1430  
7 RPMs.

8 A. I'm sorry. Which?

9 Q. Paragraph 3 of your report, at page 9.

10 A. Okay.

11 Q. Okay. All right.

12 And so we've got horsepower RPM here of 4,200 and 1,600.  
13 Does that change your opinion about maximum power, at or near  
14 maximum power?

15 A. No, it does not.

16 MR. JARRETT: Objection, Your Honor. This document is  
17 not an exhibit nor is it identified for the record.

18 MR. SIMMS: It's rebuttal, and it is --

19 THE COURT: Hang on, Mr. Simms. I understand, and the  
20 captain has testified that he's seen the specs but has not been  
21 on the vessel.

22 This is not in evidence at this point in time, but I'll let  
23 you ask him questions about his knowledge of the specifications.

24 Q. (By Mr. Simms) Did you have this knowledge of these  
25 specifications of the *Ocean Ranger* when you made your report?

1 A. Yes, I've seen these specifications.

2 Q. Okay.

3 So you testified that towing into eight- to ten-foot seas  
4 will cause damage, right?

5 A. Can cause damage.

6 Q. Can. And towing in three- to five-foot seas can cause  
7 damage, right?

8 A. Depends on what type of tow. Are you talking about the dry  
9 dock?

10 Q. A tow with a perpendicular bound.

11 MR. JARRETT: Again, Your Honor, this is outside the  
12 scope of Captain Johnson's report and his testimony. We weren't  
13 talking about three- to five-foot seas in any context in this  
14 case.

15 THE COURT: Sustained.

16 MR. SIMMS: Okay. All right.

17 Q. (By Mr. Simms) So in paragraph 5, you say, "Due to the  
18 configuration of this tow, it is my opinion that the tug had too  
19 much power for the conditions and may have directly contributed  
20 to the damage to the dry dock and to its sinking," and that was  
21 because Western was towing into head seas, correct?

22 A. Yes, at probably full RPMs, yes.

23 Q. Okay. And so towing into three- to five-foot head seas, as  
24 opposed to 10- to 12-foot head seas, that can also cause damage,  
25 right?

1 MR. JARRETT: Again, Your Honor, I hesitate to be so  
2 obstreperous, but this was not within the scope of Captain  
3 Johnson's report or his direct testimony.

4 THE COURT: Sustained.

5 Q. (By Mr. Simms) So you've been up and down the West Coast  
6 in smooth conditions and in rough conditions, correct?

7 A. Yes, I have.

8 Q. Okay. And that was for the purpose of towing.

9 In smooth conditions, what is the quickest trip from  
10 Seattle to Ensenada?

11 MR. JARRETT: Objection, Your Honor. Objection  
12 because there are so many variables left out of that  
13 hypothetical, it is not answerable.

14 Objection, Your Honor.

15 THE COURT: Sustained.

16 MR. SIMMS: Okay.

17 Q. (By Mr. Simms) Let's add some variables in there.

18 First, smooth conditions; that is, no wave higher than 10  
19 feet. Okay? No wave higher than 10 feet. Is that, in your  
20 experience, a possible condition along the West Coast from  
21 Seattle to Mexico?

22 I want to make sure I have a reasonable --

23 A. Absolutely smooth conditions?

24 Q. Absolutely, no wave ever higher than 10 feet.

25 A. Not likely.



1 Q. Okay. But let's -- so what would a smooth condition be?

2 A. Probably your aforementioned three to five feet. It sounds  
3 like a really smooth trip down the coast to me.

4 Q. Three to five feet?

5 A. At the right time of the year.

6 Q. And wind, what would a smooth wind condition be that would  
7 go along with that three to five feet?

8 A. Ten to 12 knots.

9 Q. Okay.

10 So assume the best conditions, the three to five feet, the  
11 10 to 12 knots. No head seas, that would be another best  
12 condition, right?

13 A. Correct.

14 Q. Okay. Assume those three things. Okay?

15 Now, what is the quickest you could make from Seattle to  
16 Ensenada, safely, with 528-foot tow?

17 MR. JARRETT: Again, Your Honor, objection. There are  
18 lots of variables missing from this hypothetical.

19 THE COURT: Sustained.

20 Q. (By Mr. Simms) What other variables would you need to know  
21 to be able to answer the question?

22 MR. JARRETT: Objection, Your Honor. This is outside  
23 the scope of his report and his direct testimony.

24 MR. SIMMS: It is -- Your Honor, it is directly --

25 THE COURT: I know, Mr. Simms, but it's impossible for

1 him to answer questions like this. There are too many  
2 variables; given this dry dock, given the configuration of it,  
3 all of those things. We know what happened, but it's impossible  
4 to say what would happen.

5 MR. SIMMS: Okay.

6 Q. (By Mr. Simms) So your opinion is that Western rushed down  
7 as fast as it could to -- maybe even faster -- to try to get  
8 this tow done in the shortest period of time; is that what  
9 you're saying?

10 MR. JARRETT: Objection, Your Honor. The word  
11 "rushed" does not appear in his report, so we object to the  
12 mischaracterization of his testimony.

13 THE COURT: Let me have you rephrase.

14 MR. SIMMS: Okay. All right. Here, let's read  
15 through the report.

16 Q. (By Mr. Simms) "They had incentive to push through bad  
17 weather and make the best possible speed because it was a  
18 fixed-price tow." That's at paragraph 1. Is that a fair  
19 summary of that paragraph 1?

20 A. I believe you read that correct. They had the incentive to  
21 push through bad weather and make the best possible speed,  
22 obviously, because the quicker they get down there, the more  
23 money the company makes.

24 Q. Uh-huh. Okay. Right.

25 Now, is it your opinion that -- that -- or is your

1 assumption that the number of days of the tow was a -- that  
2 there was no -- there were no extra days built into the bid for  
3 the tow?

4 MR. JARRETT: Objection, Your Honor. That is not  
5 within the wording of his report or in the scope of his direct  
6 testimony.

7 THE COURT: Do you understand the question?

8 THE WITNESS: I think I do. Let me kind of paraphrase  
9 it.

10 THE COURT: Let me overrule the objection.

11 A. Are you asking me if there was any extra days built into it  
12 somehow?

13 Q. (By Mr. Simms) Yes.

14 A. In what form? I'm not familiar with that kind of contract.

15 Q. Sure. In the bid, the contract would have extra days to  
16 account for potential bad weather.

17 Do you assume that there are no extra days to account for  
18 potential bad weather included in Western's bid?

19 A. I don't know whether there was or not, but I'm unfamiliar  
20 with that contract term. It's nothing that I've worked under  
21 before.

22 Q. Okay. Did you, at the time of your report, know that the  
23 original recommendation for the tow in the Navy plan was to have  
24 the open-ocean tow of the 70 towed in three pieces, with the  
25 center piece -- with the two end pieces loaded on the center?

1 Did you know about that?

2 A. I did not.

3 Q. Did you know that the tow did not have a -- let me back up.

4 Do you consider the *Navy Tow Manual* a reliable source to  
5 determine standards for towing?

6 MR. JARRETT: Objection, Your Honor. That manual is  
7 not addressed in Captain Johnson's report, nor in his direct  
8 testimony.

9 THE COURT: I don't think there's enough foundation at  
10 this point in time, counsel.

11 MR. SIMMS: Okay.

12 Q. (By Mr. Simms) Are you familiar with proper standards for  
13 tows?

14 A. Yes, I believe I am.

15 Q. Okay. And do you believe that the *Navy Tow Manual* is  
16 reliable source to determine standards for towing?

17 MR. JARRETT: Again, Your Honor, this is outside the  
18 scope of Captain Johnson's report and his direct testimony.

19 THE COURT: Aside from being outside, potentially, the  
20 scope, we don't even know if he is familiar with the *Navy Tow*  
21 *Manual* for dry docks.

22 MR. SIMMS: Uh-huh. Okay.

23 Q. (By Mr. Simms) All right. This is page 26 of your  
24 transcript, and question, line 21:

25 "QUESTION: Do you have or do you ever use the *Navy*

1           *Tow Manual* as a reference for determining tow, towing  
2 standards, and requirements?

3           "ANSWER: No.

4           "QUESTION: Is it a reliable source to use to  
5 determine standards for towing?

6           "MR. JARRETT: Objection to form.

7           "THE WITNESS: Yeah, I -- yeah, I believe it's a  
8 reliable source."

9           MR. JARRETT: The objection to form, Your Honor, was  
10 lack of foundation, because Captain Johnson said, on page 26,  
11 that he's not familiar with the *Navy Towing Manual*.

12           THE COURT: That will be sustained.

13 Q.     (By Mr. Simms) And then was the YFD 70 tow a dead ship  
14 tow?

15 A.     It was a dead dry dock tow. I wouldn't consider it a ship.

16 Q.     A dry dock is not a ship. Yes.

17           In your experience, would it have been a good idea to have  
18 a flood alarm on the tow?

19 A.     It certainly wouldn't have been a bad idea.

20 Q.     Okay.

21           Was it surprising to you -- did you know whether the dry  
22 dock had pumps on it?

23 A.     I didn't know whether it did or did not.

24 Q.     Uh-huh. Would it be surprising to you to know that there  
25 were no pumps on the dry dock?

1 A. It would not be surprising.

2 Q. Okay. Your transcript at 29, my question, line 6: "Yeah,  
3 well, if I told you that the pumps were all removed before this  
4 tow, would that surprise you?"

5 Your answer: "I can't say that. Well, you mean the pumps  
6 that flood and de-flood the dry dock?"

7 My question: "Yes."

8 And your answer, 13: "Well, I guess it's a little  
9 surprising, yeah. I mean, I don't know why. I guess they were  
10 worth some money, and they didn't want to, as part of the  
11 contract, sell it."

12 Is that your testimony?

13 A. That's what I said, yes.

14 Q. All right.

15 Prior to the tow, would it have been valuable for the  
16 surveyor to have -- this is talking about Bowditch -- a wasting  
17 analysis in hand?

18 MR. JARRETT: Objection, Your Honor. This is beyond  
19 the scope of his report and of his direct testimony.

20 THE COURT: Sustained.

21 Q. (By Mr. Simms) Okay. There is an opinion, the third  
22 paragraph, recommendations from the surveyor, and should a  
23 wasting analysis have been a part of the recommendations?

24 MR. JARRETT: Objection. We're beyond the scope of  
25 his direct and of his opinion.

1 THE COURT: We are, Mr. Simms.

2 Q. (By Mr. Simms) We're at paragraph 3 of your -- page 9.

3 MR. JARRETT: I'm sorry, Your Honor. I didn't track  
4 the question that referred to paragraph 3 of page 9.

5 THE COURT: There is no question yet.

6 MR. JARRETT: Thank you.

7 MR. SIMMS: There is a question.

8 Q. (By Mr. Simms) The question is: Should the trip and tow  
9 recommendations from the surveyor have included a wasting  
10 analysis?

11 MR. JARRETT: Your Honor, same objection.

12 THE COURT: Sustained.

13 Q. (By Mr. Simms) Are you familiar with Captain Fox. Do you  
14 know him?

15 A. Yes, I do.

16 Q. Okay. And you trained him, didn't you?

17 A. He served a lot with me on the various tugs I was captain  
18 of, and I believe I did have some input into his training, yes.

19 Q. And what's your opinion of his ability and experience?

20 MR. JARRETT: Your Honor, Captain Fox -- objection.  
21 This is beyond the scope of Captain Johnson's report and  
22 testimony. He did not review Captain Fox's report, either.

23 THE COURT: Sustained.

24 MR. SIMMS: Let me see if there are any more questions  
25 here.

1 All right. Thank you.

2 THE WITNESS: Thank you.

3 THE COURT: Any redirect?

4 MR. JARRETT: No. Thank you, Your Honor. Thank you,  
5 Captain Johnson.

6 THE COURT: Captain, thank you. You may step down.  
7 Vietnam between '66 and '70 must have been an interesting place.

8 THE WITNESS: It was very interesting. Mekong River  
9 was particularly interesting.

10 THE COURT: Good luck in your retirement, sir.

11 MR. BOYAJIAN: Your Honor, Mr. Keen has been with us  
12 all last week. He had cleared all last week, but he has to  
13 operate dry dock today, and he will have to leave shortly after  
14 eleven o'clock this morning.

15 THE COURT: All right. That's perfectly fine.

16 Other than Mr. Challenger, are there any other witnesses on  
17 behalf of the defense?

18 MR. BOYAJIAN: We have two other witnesses, Your  
19 Honor. Both of them are available this afternoon. They were  
20 available last week, Your Honor, but were unable to clear their  
21 whole day today.

22 THE COURT: Right.

23 Mr. Simms, at this point in time, do you plan on calling  
24 any other witnesses?

25 MR. SIMMS: We don't, Your Honor.



1 THE COURT: Okay. All right.

2 Counsel, I remember, in the ruling on the motions in  
3 limine, looking at the objection, I believe, by Western about  
4 why Mr. Challenger should not be allowed to testify. But what I  
5 want to do is go back and review that, and review the arguments  
6 made by both sides. Obviously, the court can change its mind on  
7 motions in limine. I tend not to, just to let you know, but let  
8 me go back and take a look at it.

9 Give me, maybe, 15 minutes or so. We'll go ahead and take  
10 a break at this point in time. I can make a ruling, and then we  
11 can wait and see, as soon as your witnesses might be available  
12 this afternoon.

13 MR. BOYAJIAN: Mr. Challenger is at the courthouse.  
14 He's not on the 14th floor. He's downstairs. But other than  
15 that, our witnesses will be available from 1300 on -- 1:00 on.

16 MR. SIMMS: Your Honor, as long as we're looking at  
17 legal issues here, going through the exhibits -- and this was  
18 Vigor, I think, 94 and 95 -- one thing that has jumped out is  
19 that most of the payments for the damages, or whatever it is  
20 that Vigor will claim, were made by insurance carriers; that is,  
21 they've already been made. And there's a waiver of subrogation  
22 in the tow contract, and also in the insurance policies.

23 And so, at least, for the amount that was paid, which seems  
24 to be most, if not all, of it, there is not a real party in  
25 interest which is claiming the money. In other words, Vigor has

1 already been made whole for all of this, and so any testimony by  
2 Mr. Challenger or Ms. Cartwright is not relevant.

3 As a matter of fact, Vigor does not have the right to raise  
4 that claim because, first, they're already paid, and second,  
5 because the insurance carrier, which is the real party in  
6 interest, has waived subrogation.

7 THE COURT: All right.

8 MR. HOWARD: Your Honor, I'm prepared to respond.

9 THE COURT: Yes.

10 MR. HOWARD: Your Honor, there's two separate issues  
11 in this case. It a contract case where Mr. Simms' issue  
12 probably should have been brought up earlier and briefed as  
13 opposed to the last day of presentation.

14 But we're bringing up issues where maritime law clearly  
15 establishes the collateral source rule would make this argument  
16 irrelevant for the marine negligence aspect of this case.

17 The exhibits that have already been stipulated to -- I  
18 believe they are 93 and 94, as opposed to 94 and 95 -- do,  
19 indeed, show the payments that made. In fact, the amount of the  
20 payments are already in evidence.

21 The collateral source rule deals with his objection now  
22 with respect to Vigor being made whole for those payments made  
23 by it and on its behalf, as the documents will show, primarily  
24 through our firm's trust account.

25 That, however, to be more explicit on the example, you'll

1 notice Vigor is not bringing a claim for the loss of the dry  
2 dock itself. That's one to which the provisions he's arguing  
3 would apply. That's part of the contract claim.

4 We bring this damage as part of the marine negligence  
5 claim, which Your Honor has ruled on, and, for that, the  
6 collateral source rule of maritime law governs.

7 THE COURT: All right.

8 MR. SIMMS: Your Honor, the payments were made under  
9 the very same insurance policies that have the waiver of  
10 subrogation. There was no way that those payments came in but  
11 for those contracts with the waiver of subrogation clause.

12 THE COURT: Counsel, if it becomes a real issue for  
13 the court, we may have to have some additional briefing on that.  
14 But, like I said, let me go back and review it, in all fairness  
15 to the parties and to Mr. Challenger, and then I'll let you  
16 know.

17 If we're not going to have him testify, then we'll come  
18 back in session at one o'clock, when their witnesses are ready.

19 MR. JARRETT: Thank you, Your Honor.

20 THE COURT: All right. We'll be at recess.

21 (Court in recess 10:45 a.m. to 11:08 a.m.)

22 THE COURT: Mr. Simms, where we left off right before  
23 the break, in terms of argument that you were making, counsel,  
24 isn't this really what you asked the court to look at in summary  
25 judgment, at the very beginning of the case? Maybe I need you

1 to elaborate a little bit more on what argument, exactly, you're  
2 making.

3 MR. SIMMS: No. It's Rule 7. Every claim brought by  
4 the real party in interest. Vigor is not the real party in  
5 interest for most, if not all, of the amounts it's claiming.

6 We've got, in the Schwabe firm's client trust account  
7 ledger, there's \$354,028.64, which is received from insurers and  
8 then paid back out to Vigor. And so Vigor is made whole for all  
9 of that money, and the insurers have waived subrogation.

10 So if this were a car accident -- if I was the plaintiff  
11 hurt in a car accident and my medical insurer paid for my  
12 medical, and then I went out and I got a recovery, I would be  
13 subrogated to that or have to pay back the insurer.

14 Here, though, there is no subrogation.

15 THE COURT: I fully understand that, counsel, but why  
16 is argument being made now after five days of trial? Why  
17 couldn't we have made this argument at the very beginning and  
18 ruled that there was no injury? Then wouldn't we have had all  
19 the testimony that we did.

20 MR. SIMMS: Well, because I -- two things: First, in  
21 this -- I was sitting here and listening to all this, and I said  
22 to Mr. Howard, "Isn't there a subrogation problem here because  
23 of waiver and everything was paid?" And I have raised this  
24 twice -- three times now since then, and no response.

25 And I saw this and I saw Greg Challenger's -- we've been

1 through this. And then I looked back at this exhibit, and there  
2 it is. And if there is two cents left that's not reimbursed to  
3 Vigor, then we're still in the question of damages, but we're  
4 still -- we're tossing over two cents rather than -- well, the  
5 trial brief says \$415,441.67, but the interrogatories say that  
6 there is -- the damages were \$397,476.67, Vigor's interrogatory  
7 answers that we have marked as Exhibit 41. So there's a \$17,000  
8 difference there.

9 The expense invoices in 93 total that \$397-. But the point  
10 is, they have to show that the damages are being brought by the  
11 real party in interest. They're being sought by the real party  
12 in interest. They can't show that.

13 The collateral source rule is quite different than what  
14 we're hearing here. Collateral source rule is -- let's say I'm  
15 a plaintiff, and I come in and say I've been badly hurt, and the  
16 other side comes in and says -- Oh, and I want a million  
17 dollars. And the other side comes in and says, Well, it's not  
18 so bad, because you got \$999,000 reimbursed by your medical  
19 insurer, so you really weren't hurt that badly.

20 The collateral source rule says uh-uh, you don't look at  
21 that, you don't subtract from the million-dollar claim.

22 That's not what this is. This is just, I paid out money, I  
23 want back money. We're not talking about a right to a double  
24 recovery here. We're not talking about recovery.

25 What's going to happen is -- is Vigor pursuing the rights

1 of these insurance companies here, or is it going to just keep  
2 the money? Well, it can't because it's waived subrogation.

3 These payments came through these policies that were  
4 procured under the towage contract. And I've got copies of the  
5 policies, if the court wants to see them. Every single insurer  
6 that's named here -- Berkley, AXA XL Specialty, Starr Marine --  
7 are part of this insurance that Vigor obtained required by the  
8 tow contract. So they've got -- the insurers have been paid the  
9 money.

10 If they want to come and get the money, the insurers have  
11 to get the money, under Rule 7, because they're the real parties  
12 in interest.

13 THE COURT: Mr. Howard?

14 MR. HOWARD: Your Honor, this is a situation where  
15 we're seeking maritime negligence damages and where collateral  
16 source rule is well established under federal maritime law -- I  
17 can cite cases, if you want, or submit them later, which, I  
18 think, is more efficient -- that the collateral source rule  
19 applies.

20 We agree that this argument of Mr. Simms would apply to a  
21 claim we have not brought for the loss of the tow.

22 That contract case, we agreed it applies there. It does  
23 not apply to the maritime negligence case where the damages have  
24 been paid by or on behalf of Vigor. That's what should be  
25 admissible.

1           The case law authority, which I will send a supplemental  
2       brief to Your Honor as to why it is collateral source rule and  
3       should be allowed in. The issue of insurance does come in here.  
4       We don't hide it in Exhibits 93 and 94, because insurance was  
5       required under the contract, and so we complied to the contract  
6       in that regard. But this is an issue that should have been in  
7       the trial brief and could be addressed in supplemental briefing,  
8       and should not prevent the taking of the evidence today, Your  
9       Honor.

10           THE COURT: Counsel, I hate to have the parties spend  
11       even more money on this, but I -- the main thing we always want  
12       to do is, we want to get it right. We don't want you leaving  
13       from here with issues that could have been resolved and should  
14       have been resolved. And I certainly, like I said, don't want to  
15       impose more costs on the parties, but I think it's an issue that  
16       we will definitely need additional briefing on.

17           I'm just upset about the timeliness of it, at this point in  
18       time. It doesn't make any sense, counsel. We could have  
19       shortened this entire thing if the court had ruled a certain  
20       way, based on the argument that you're making today. But we're  
21       almost at the very end. I'll let you go ahead and finish.

22           And, like I said, we'll have additional briefing on that.  
23       At this point, the court hasn't made any ruling yet as to  
24       whether contributory negligence, on behalf of Vigor, and what  
25       that means in terms of any potential damages that might or might

1 not come into play. I know it's all hypothetical, but, like I  
2 said, we want to get it right.

3 In all the years I've been a judge -- going on 32 years  
4 now -- I have always not enjoyed making procedural rulings that  
5 overcome the call on the merits. I've always believed that the  
6 parties deserve the right to have their case determined on the  
7 merits and not just procedure. But I am concerned about the  
8 timeliness of this entire thing at this point, too.

9 All right. I know your other witnesses will be here at one  
10 o'clock.

11 There remains one other issue, and that is the testimony of  
12 Greg Challenger. I had a chance to review the motions in limine  
13 and the court's ruling on it, and, at this point in time, I'm  
14 not convinced that the testimony of Mr. Challenger is relevant  
15 or necessary at all, in terms of the findings the court has  
16 already made. So that finding will not be disturbed.

17 So, Mr. Boyajian, who are the two witnesses this afternoon?

18 MR. BOYAJIAN: This afternoon, Your Honor, we have  
19 Mr. Ken Campbell, he's a weather expert, and we have Dawn  
20 Cartwright from Vigor.

21 THE COURT: All right. Then 1300 it is.

22 MR. HOWARD: Ms. Cartwright will be on the phone at  
23 1300, Your Honor.

24 THE COURT: Thank you. We'll be at recess.

25 (Court in recess 11:17 a.m. to 1:02 p.m.)



1 THE COURT: You may call your next witness.

2 MR. HOWARD: We call Dawn Cartwright.

3 THE COURT: Good afternoon. Ms. Cartwright, are you  
4 on the phone?

5 THE WITNESS: Yes.

6 THE COURT: This is Judge Martinez. You've been  
7 called as a witness in this particular matter, and, thankfully,  
8 we could get you in by telephone, so I'll swear you in.

9 DAWN CARTRIGHT,  
10 having been first duly sworn, testified as follows:

11 THE COURT: Please, wait until counsel's question is  
12 complete before you answer. If you don't understand something,  
13 don't hesitate to say so, and we'll get counsel to clarify for  
14 you. Okay?

15 THE WITNESS: Understood. Thank you.

16 THE COURT: All right. You may inquire.

17 DIRECT EXAMINATION

18 BY MR. HOWARD:

19 Q. As a preliminary matter, Ms. Cartwright, we've been having  
20 trouble with phones that are on speakerphone. You may, for the  
21 court reporter's benefit, disable speakerphone on your end.

22 A. Okay. I've done so.

23 Q. Would you state your name, please?

24 A. Dawn Cartwright.

25 Q. What is your profession?

1 A. I'm the vice president of human resources and risk  
2 management for Vigor.

3 Q. And how long have you worked for Vigor?

4 A. About nine years.

5 Q. What does your job entail at Vigor?

6 A. On the risk management side, primarily insurance placement,  
7 claims management, and loss control.

8 Q. In that capacity, have you been involved with the work  
9 related to working with NOAA regarding the loss of this dry  
10 dock?

11 A. Yes, I have.

12 Q. And, specifically -- Exhibits 93 and 94, you have copies of  
13 those with you; is that correct?

14 A. I do, yes.

15 Q. Those have already been admitted, and I'll come back to  
16 those at the end of your testimony.

17 But you're familiar with the expenses that have been paid  
18 by or on behalf of Vigor related to cooperating with NOAA; is  
19 that correct?

20 A. Yes. They have been reviewed by the risk management  
21 department and either paid by Vigor or directed to be paid by  
22 Vigor.

23 Q. What I want to get to about that is -- because I know  
24 Mr. Simms will have questions -- why did Vigor pay these bills?

25 A. I would say there were probably four, kind of, major

1 reasons. One was NOAA reached out to us, you know, relatively  
2 soon after this event occurred, and we view them as, basically,  
3 like law enforcement for the ocean, and so just as we would,  
4 kind of, cooperate with any law enforcement, that was the  
5 primary reason.

6 Secondary, you know, we hadn't had something like this  
7 happen in our history, so we immediately tapped experts at  
8 Schwabe and our insurers, and, generally, understood from the  
9 advice of people that had been through this before, that it was  
10 best for us to cooperate; that it was going to be cost  
11 effective, it's going to be -- you know, we were going to be  
12 seen as partners and at the table as opposed to adversaries.

13 As we went along the way, I think we learned that it was  
14 going to be less expensive. Some of the things that they wanted  
15 to do, they were going to do regardless of whether we cooperated  
16 or not, and we could probably get those things done more cost  
17 effectively for Vigor and others, and probably faster than NOAA  
18 would have done it.

19 And then, I think, kind of underlying that, that was just  
20 our general company culture, and one of our values is  
21 responsibility; that we act on what we know is right. And  
22 whether we were responsible for what happened or not, we  
23 certainly felt a sense of responsibility.

24 Q. Thank you. I'd like to follow up on a just a couple of  
25 points.

1           When you talk about being cost effective, did you track  
2 whether this ended up being less expensive than what NOAA told  
3 you it was going to cost?

4       A.    Yeah. Originally, when we had, kind of, a range given by  
5 NOAA to Vigor, it was -- and this was specifically around the  
6 ROV exploration for the dry dock -- they had indicated that it  
7 would be somewhere between \$450,000 and \$600,000. And, I think,  
8 by the material (inaudible) on this case, you know, we've come  
9 in at a little over \$400,000. So I think definitely it would  
10 have been less expensive than what they led us to believe if  
11 they did it.

12      Q.    Did you -- Vigor -- get any other benefits by cooperating  
13 with NOAA?

14      A.    Yeah. I mean, we generally feel like we have a good  
15 rapport with them -- right? -- so I think as we continue  
16 conversations with them, we hope that will be helpful to us.

17           We have a seat at the table. So we're the ones that  
18 organized the ROV. We had people on the ROV that had our  
19 interests at heart and were able to actually see what was down  
20 on the floor of the ocean where the dry dock landed and the  
21 conditions in which it was sitting in. So I think we had some  
22 intelligence that we might not have otherwise had that could be  
23 helpful to us.

24           Those are probably the primary reasons.

25      Q.    Do you have an understanding as to whether or not Vigor

1 would have been able to have someone on the ROV without  
2 following the path you followed?

3 A. I don't know. I don't recall whether we ever spoke to them  
4 about that or they indicated one way another whether that would  
5 be possible.

6 Q. Now, you've reviewed Exhibits 93 and 94. Do these include  
7 checks actually made by Vigor and paid by Vigor?

8 A. Yes. They're payments made directly by Vigor, and then  
9 payments made at Vigor's -- by our insurers at Vigor's  
10 direction. And this was largely due to a deductible that we had  
11 on the policy that had to be, you know, met before insurance  
12 would be responsive to the loss.

13 Q. And did your department approve all of these expenses?

14 A. Yes. Whether Vigor paid them or the insurers paid them,  
15 they all came through us and were reviewed for reasonableness  
16 and accuracy.

17 MR. HOWARD: Thank you. I have no other questions.  
18 Mr. Simms may have some.

19 THE COURT: Mr. Simms?

20 CROSS-EXAMINATION

21 BY MR. SIMMS:

22 Q. Ms. Cartwright, this is Steve Simms. I'm Western's  
23 lawyers.

24 What was the amount of deductible you referred to?

25 A. \$100,000.

1 Q. Okay.

2 Q. Has that deductible been met?

3 A. Yes, through payment of these invoices and legal fees, et  
4 cetera.

5 Q. Okay. So some of the \$100,000 was to pay legal fees?

6 A. Yes. I mean, we have a deductible for any costs that are  
7 incurred on the claims.

8 Q. Well, let me knock this down.

9 How much of the deductible was to pay legal fees?

10 MR. HOWARD: Your Honor, object as to relevance of  
11 this inquiry.

12 MR. SIMMS: Absolutely relevant, because we're trying  
13 to figure out --

14 THE COURT: All right. Overruled.

15 Q. (By Mr. Simms) How much of the deductible was to pay legal  
16 fees?

17 A. I don't know.

18 Q. How much of the deductible was to pay costs of -- I'll call  
19 them "ROV costs."

20 A. I don't recall the split between the initial fees and what  
21 was part of the deductible; whether it was for legal fees or the  
22 ROV cost or the consultant fee with Polaris.

23 Q. Okay. So in Exhibit V-93, adding up everything, we get  
24 \$397,476.67, but in the trial brief that Vigor put in, the  
25 figure is \$415,441.67.

1           What explains the difference of \$17,965?

2       A.    I don't have an immediate answer for that.

3       Q.    Okay. So the support Vigor has for its claim is -- is the  
4       claim \$397,476.67?

5       A.    My recollection of the figure is a little over \$415,000.

6       Q.    Okay. All right. But you don't know what makes up the  
7       \$17,000 difference. All right.

8           So, then, in A-94, the very last page is the Schwabe firm  
9       client trust account ledger showing amounts received from  
10       insurers, \$354,028.64. And my question is: If you go off the  
11       397 figure, what -- is there \$43,448.03 not reimbursed, or was  
12       it reimbursed?

13       A.    We met our deductible, which was \$100,000, and after that,  
14       our insurance has been paying for the cost associated with the  
15       claim. Some of those payments were made directly to the Schwabe  
16       account because we met our deductible.

17       Q.    Okay. But you can't say today what amount of the  
18       deductible was legal expense, what amount was anything else,  
19       right?

20       A.    That's correct.

21       Q.    And am I right, the legal expense now -- and this was in  
22       the interrogatory responses -- it's running over a half million  
23       dollars for --

24       A.    Again, once Vigor met its deductible, I don't know what  
25       they've been running.

1 Q. Okay. So that's -- that was all paid by insurers. Okay.

2 All right. So are you saying that all the bills came in to  
3 you to approve?

4 A. Yes. All the bills that make up the \$415,000 came through  
5 Vigor to review and approve.

6 Q. Okay. Because the only bills we have is \$397,000. They  
7 are bills -- so Polaris, \$45,496.53. Did you review and approve  
8 all those bills that initially went to the Schwabe firm?

9 A. Right. So Polaris's and Eclipse's, correct.

10 Q. So the Polaris bills, those initially went to the Schwabe  
11 firm, correct?

12 A. Yes, I think so.

13 Q. And before they were paid, did you review those?

14 A. That's correct.

15 Q. You did? Did you review them?

16 A. Yes, I reviewed them.

17 Q. All right.

18 And so the Eclipse bill, \$351,980.14, again, that bill went  
19 for the Schwabe firm first. Did you review that bill before it  
20 was paid?

21 A. (Inaudible.)

22 Q. Is that a "yes"?

23 A. (Inaudible.)

24 THE COURT: Ms. Cartwright, our court reporter is  
25 having difficulty following your testimony. Can you speak up?



1 A. Correct. I said "yes" to the Polaris review of the bills  
2 and "yes" to Eclipse review of the bills.

3 THE COURT: That's perfect. Thank you.

4 Q. (By Mr. Simms) And so -- well, exactly how much benefit,  
5 then, has Vigor gotten from this figure, whether paid for by the  
6 insurers or not? Exactly how much?

7 A. I'm not sure I understand that question. What do you mean?

8 Q. So NOAA hasn't assessed any penalties, right?

9 A. Correct.

10 Q. And so you can't say today that even a dollar that you  
11 spent has had any benefit, can you?

12 MR. HOWARD: Objection; asking for a legal conclusion  
13 and beyond the scope of what's left in the case.

14 THE COURT: It is. Sustained.

15 MR. SIMMS: Okay.

16 Q. (By Mr. Simms) Well, so you said you hoped that this  
17 advance would be helpful to Vigor. Do you have anything beyond  
18 that hope that it's been helpful?

19 MR. HOWARD: Objection. Same objection.

20 THE COURT: Sustained, Mr. Simms.

21 MR. SIMMS: Okay. All right. No other questions.

22 MR. HOWARD: I have one clarifying question, Your  
23 Honor.

24 THE COURT: All right. You can ask it from there,  
25 Mr. Howard. It might be easier for you.

1 MR. HOWARD: Did you see my knee just went out?

2 REDIRECT EXAMINATION

3 BY MR. HOWARD:

4 Q. Ms. Cartwright, I have two different number, \$397- and  
5 \$415-. I have a background question for that.

6 Have you continued to approve and direct to be paid bills  
7 for Polaris?

8 A. Yes. I think we're still continuing to see relevant bills  
9 in this case.

10 Q. And what is your understanding of the number that has been  
11 paid by or on behalf of Vigor for Polaris and Eclipse?

12 A. A little over \$415,000.

13 MR. HOWARD: Thank you. No other questions.

14 MR. SIMMS: All right. We'll object to the  
15 introduction of any evidence of anything over -- first, the  
16 objection that we raised earlier, real party in interest, but  
17 also in the interrogatory answers, which are 41.

18 THE COURT: Mr. Simms, hang on.

19 Can we release Ms. Cartwright?

20 MR. SIMMS: Yes.

21 THE COURT: All right. Ms. Cartwright, thank you very  
22 much. That's all the questioning, and we thank you very much.

23 MR. HOWARD: Thank you, Your Honor.

24 MR. SIMMS: So, Your Honor, in the interrogatory  
25 answers, which are Exhibit 41, the figure given is that

1     \$397,476.67 number, there was a responsibility to seasonably  
2     amend the responses to the interrogatories.

3             There's also no evidence of any -- any -- anything -- no  
4     expense invoices or anything like that, so there can't be a  
5     figure larger than \$397,476.67 that's involved here.

6             THE COURT: All right. I understand your objection.  
7     It's noted for the record.

8             An accounting of this will wait for the end of the trial  
9     itself, and we'll see exactly what claims are being made by  
10    Vigor.

11            All right. You may call your next witness.

12            MR. BOYAJIAN: Yes. He's just texted me that he's  
13    dialing in now, Your Honor.

14            Mr. Campbell, you'll have to hit star six to let us know  
15    you're there. If you're not, I'm talking to dead air. It's  
16    just like being at home.

17            THE COURT: Over the last 16 months, I've been  
18    speaking to dead air, too.

19            MR. BOYAJIAN: Your Honor, with the pandemic and being  
20    at home with my wife and kids, I have, too.

21            THE WITNESS: This is Ken Campbell.

22            MR. BOYAJIAN: Your accent is unmistakable. I knew  
23    who it was immediately. The judge will swear you in.

24            THE COURT: Mr. Campbell, good afternoon. Can you  
25    hear me?

1 THE WITNESS: Yes, I hear you fine. Good afternoon.

2 THE COURT: Okay. I know you're on the phone. If you  
3 could take it off speaker, if there is any speaker function on  
4 it, it makes it easier for us, and our court reporter as well.

5 Keep your voice up. We're in a large courtroom. It's  
6 coming through the speakers, but it will help us as well.

7 THE WITNESS: I'm off speaker.

8 THE COURT: All right. You've been called as a  
9 witness, and I'm sure both sides will have questions for you.  
10 Raise your right hand, and I'll swear you in.

11 THE WITNESS: My hand is raised.

12 KEN CAMPBELL,  
13 having been first duly sworn, testified as follows:

14 THE COURT: Mr. Boyajian, you may inquire.

15 MR. BOYAJIAN: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. BOYAJIAN:

18 Q. What do you do for a living?

19 A. I currently am retired, but for the previous 41 years I was  
20 a weather forecaster. For the last 26 years, I owned a company  
21 called Commanders Weather Corporation, which specialized in  
22 weather forecasts for sailing.

23 Q. Okay. Is that forecasting and routing?

24 A. Yes. The company -- about 40 percent of the revenues was  
25 generated from races, and those races could be split into short

1 inshore races and distant races, such as the Transpac race from  
2 Long Beach to Honolulu. 60 percent of the business was weather  
3 routing for specific clients all around the world.

4 Q. Is there any fundamental difference between the routing you  
5 do at Commanders, which is to help a sailboat, that tells you  
6 what are their weather parameters to get safely from one spot to  
7 another, and what you would have done if asked by Western  
8 Towboat, in this case, to help forecasting and routing for a dry  
9 dock tow from Seattle to Ensenada?

10 A. Sure. Not all of our routing is just sailboats. We also  
11 do motor yachts.

12 What I would have done with Western Tow is that, in the  
13 initial call, I would want to find out all the parameters -- sea  
14 state, weather conditions, whether there were any time  
15 constraints. Another thing that I would do is I would get all  
16 the communications information, and then I'd give them a brief  
17 overview of some of the weather problems that they may encounter  
18 during that time of year and any potential options that they may  
19 have. For example, for stopping at one location or not being  
20 able to stop. So that would be the introduction.

21 Then I would make a suggestion to them. About three days  
22 before their first departure date, we would start looking for a  
23 weather window.

24 And what I do when I look for a weather window is I give  
25 them the weather options, but I don't tell them whether to go.

1 It's more of a discussion; the positives and negatives leaving  
2 on certain days.

3 Once we establish the day that it would be best for them to  
4 leave, then I would produce a weather forecast, and our  
5 weather-routing forecasts go out as far as eight days. We don't  
6 feel comfortable going beyond eight days, but eight days is a  
7 very standard pre-to-departure weather-routing forecast.

8 That forecast is then specific to their boat. We take the  
9 counter of six of that tow, and we figure out where they're  
10 going to be along that route at that particular time, and then  
11 do a specific wind and sea state forecast for them at that  
12 particular time, for eight days, all the way down to the  
13 completion of the trip. That's on the departure day.

14 If the weather conditions look fine, we may not suggest an  
15 update the next day, but in that forecast we'll make a  
16 suggestion of when we think the next update should be done.

17 We ask the client, every single day, to please send in a  
18 position report, status report, how they're doing. Then we  
19 would check their progress versus the weather that day. If we  
20 see something that they need to know about, we will contact  
21 them, at no charge, and make a suggestion that they should get  
22 an update --

23 MR. SIMMS: Your Honor --

24 A. -- if all is well, we will not contact --

25 MR. SIMMS: -- this is not in the report. None of it

1 is in the report.

2 MR. BOYAJIAN: Your Honor, Mr. Campbell's report  
3 discusses what it is to be a weather router, his experience as a  
4 weather router, and he's giving a background on what a weather  
5 router does. I haven't ask a specific question about this case  
6 yet.

7 THE COURT: That's where I thought we were, just  
8 getting background information.

9 MR. SIMMS: All right.

10 THE COURT: All right. Next question.

11 Q. (By Mr. Boyajian) Mr. Campbell, you have seen, in this  
12 case, the tow plan and tow-plan amendment, correct?

13 A. I didn't quite catch the question. Could you repeat it?

14 Q. You've seen the tow plan and the tow-plan amendment that  
15 were prepared by Western in this case, haven't you?

16 A. Could you give me something more specific? Because I've  
17 seen all the plans, but there is a lot of them, and they were  
18 contradictory, so --

19 Q. Sure.

20 A. -- could you say specifically which one?

21 Q. Yes.

22 I have something on the screen here in the courtroom that  
23 you don't have the benefit of.

24 In the tow-plan amendment prepared by Western, there is a  
25 section titled "weather routing," and then it says --

1 MR. SIMMS: Your Honor, this is not in the report.  
2 There is no disclosure that it was something -- he refers to the  
3 tow plan. Okay. Go ahead.

4 MR. BOYAJIAN: And I haven't asked a question yet.

5 Q. (By Mr. Boyasian) It says, "Weather routing. Western  
6 Towboat will be using Rich Courtney of Maritime Weather Service  
7 for weather information and course guidance."

8 There is a few things there I want to pull apart.

9 Is what you've described just a moment ago generally what  
10 the industry considers, quote, weather routing?

11 A. That's a tough question. Because the industry is  
12 relatively small, we're probably one of the larger companies  
13 that does this type of weather routing for sailboats and motor  
14 yachts. What we do, I'm certain of. What everybody else does,  
15 I'm not certain.

16 Q. Okay. Let me ask it this way, Mr. Campbell: Is what  
17 you've described earlier what you consider to be reasonable  
18 weather routing?

19 A. Absolutely. That's the way that I want all my employees to  
20 do it, and, yes, absolutely.

21 Q. And then it also says that Mr. Courtney will provide  
22 weather information and course guidance.

23 Could you tell us what you understand weather information  
24 and course guidance from a weather router to be?

25 A. Certainly.



1           What we try to do is, when somebody comes to us for a  
2 project, the most important thing is completing a project  
3 safely. And sometimes it requires us to slow a boat down or  
4 speed them up to make sure that you handle the weather properly.  
5 And sometimes you've got to take a slightly different route than  
6 the shortest route.

7           So that's what weather routing is; to help a client utilize  
8 the weather that they have to successfully complete a project.

9       Q.   Do you need to be in ongoing contact with the client to  
10 provide reasonable weather routing?

11      A.   That is certainly preferred.

12           When I first started the business, communications at sea  
13 was difficult. In the present time, and certainly the last  
14 several years, communications at sea is quite easy and quite  
15 common. And that is the preferred client that we'd like to deal  
16 with, somebody that we can get in touch with in case something  
17 changes.

18      Q.   Okay. Let me turn now to a little bit of the specifics in  
19 this case.

20           Is it important to you that, when a potential client  
21 contacts you, they give you an accurate assessment of what their  
22 weather restrictions will be?

23           MR. SIMMS: Objection. Not in the report. Not in the  
24 report. That's an opinion that's not in the report.

25           MR. BOYAJIAN: Your Honor, a weather router provides

1 forecasting subject to restrictions. I'm just asking  
2 Mr. Campbell if it's important to know what those restrictions  
3 are.

4 THE COURT: Exactly. Objection overruled.

5 A. I can answer that question.

6 Q. (By Mr. Boyasian) Please do.

7 A. Absolutely.

8 Each client is different. Each client is going to have  
9 different restrictions, and we've got to have an honest  
10 assessment from the client in what they're trying to do;  
11 otherwise, we may not route them the correct way.

12 Q. Okay.

13 For example, if a client tells you, We have a sea height  
14 restriction of 15 feet, but the actual restriction should be 10,  
15 can you provide them with an accurate weather window or routing  
16 forecast?

17 A. What I would do is I'd ask them to clarify that difference.  
18 Because there is going to be difference. Fifteen feet and ten  
19 feet is a huge difference.

20 So we'd have to get a clarification, because the routing  
21 would be different -- actually, very different.

22 Q. Let's turn now to the specifics of this case.

23 You're familiar with the dry dock YFD 70 and the fact that  
24 they left Puget Sound, crossed Puget Sound for a day, and then  
25 turned south at Cape Flattery in the early afternoon sometime of

1 October 18th, 2016.

2 Have we set the stage? We're in the same place?

3 A. Yes.

4 Q. Did the *Ocean Ranger* have a favorable forecast of  
5 conditions less than 4-6 when they turned south at Cape Flattery  
6 on October 18th, 2016?

7 A. Well, in fact, the forecast for October 19th, the second  
8 day at sea, were for conditions at 25 to 35 knots, which exceeds  
9 4-6. And the seas were forecast to be up as high as 10 to 12  
10 feet, which also exceeds 4-6. The forecast for those conditions  
11 were to last up to a day.

12 Q. Okay. So is that answer, no, they did not have a forecast  
13 that fit within the restrictions as you understand them  
14 applicable to the tow of the YFD 70?

15 A. That's correct.

16 Q. Had you been hired as their weather router, what would you  
17 have told Western Towboat as they approached Flattery with the  
18 intention of turning south on the afternoon of the 18th?

19 MR. SIMMS: Continued objection. Not in the report.

20 MR. BOYAJIAN: Your Honor, Mr. Campbell's report is  
21 nothing but what forecasts he would have provided.

22 THE COURT: Overruled.

23 MR. SIMMS: Different.

24 THE COURT: Mr. Campbell, you may answer.

25 A. Yes.

1           We don't make the decisions on whether people go or not go.  
2           We provide advice.

3           What we would have done is we would have forecast those  
4           conditions. If they told us they were going to continue on, the  
5           request would have been made by me or another forecaster to  
6           please stay in close contact with us and let us know how they're  
7           making out, because if the conditions exceed what the limits  
8           are, it would raise a serious level of concern with us. And my  
9           feeling is, I would want to hear from them frequently to make  
10          sure that everything was going well with them.

11        Q.    Okay.

12          The storm that came up on the 24th and 25th, you were not  
13          present in the courtroom last week, but there's been testimony  
14          that it was the worst weather of the trip. Would you agree with  
15          that?

16        A.    That's correct.

17        Q.    How could the *Ocean Ranger* had known about this storm that  
18          was going to materialize on the 24th and 25th?

19               MR. SIMMS: Can we see in the report where there is a  
20          reference to this?

21               MR. BOYAJIAN: The forecast within the report. The  
22          forecaster broken down by forecasts that would have received on  
23          various dates. He was asked about the storm, both in the  
24          deposition that you took and as the subject of this expert  
25          report. So asking him, as a forecaster, on what day would the

1 forecast had been available, I think is within the scope of his  
2 expert testimony, as covered in the report and in your  
3 deposition.

4 MR. SIMMS: It's not in here.

5 THE COURT: If there is an objection, it's overruled.  
6 Mr. Campbell, you may respond.

7 A. Thank you.

8 The October 20th -- and if I may elaborate a little bit?  
9 The only data that we archive in our office is the GFS GRIB  
10 files, which is the U.S. Global Forecast model. So when I was  
11 first contacted, I accessed that data, and the first time that  
12 that storm system showed up on the weather models was on October  
13 20th.

14 Now, subsequent to that, the attorneys have sent over to me  
15 some intergovernmental forecast discussions, and those  
16 discussions discuss all the various weather models that those  
17 government forecasters have, and they started seeing a problem  
18 on some of the other weather models, showing up as early as the  
19 19th. But the data that I had, the earliest I saw it was the  
20 20th.

21 Q. Thank you.

22 Finally, switching to the last topic that I'd like to  
23 discuss with you.

24 The weather restrictions in this case -- and I'm -- there  
25 are slight differences between which document you look at -- but

1 roughly eight- to ten-foot seas and less than 25 knots of wind.

2 How many days in favorable weather did you calculate the  
3 *Ocean Ranger* needed to get from Cape Flattery to San Francisco?

4 A. If there were no weather problems whatsoever, it was going  
5 to be a five- to six-day trip, but as soon as they run into bad  
6 weather, the boat is going to slow down, and as it turns out, it  
7 ended up being an eight-day trip.

8 Q. There's been a considerable amount of testimony, that you  
9 also didn't sit through, that Western Towboat's personnel are  
10 somewhat expert at reading weather maps and predicting weather  
11 systems.

12 For someone with that background, would it have been  
13 reasonable for them to think that they would have a five-, six-,  
14 or seven-day weather window that complied with the restrictions  
15 in this case in the second half of October?

16 MR. SIMMS: Objection; not in the report. That's an  
17 opinion of an expert that is not in his report.

18 THE COURT: Mr. Simms, that's fine. Your objection  
19 will be noted.

20 The court can read the report. It is a bench trial. If  
21 it's not in the report and the court feels it is not relevant at  
22 that point in time, the court can disregard it.

23 MR. SIMMS: Thank you.

24 THE COURT: Mr. Campbell, you may respond.

25 A. Yes.

1           At that time of the year, it would be very difficult to  
2       find a six- to eight-day favorable weather window. Just from my  
3       experience of doing this for -- in excess of 25 years, it's not  
4       the favorable time of year to do it.

5           And, personally, that's one of my bugaboos with routing  
6       clients. They want to go at unfavorable times of year, and it  
7       makes my job more difficult.

8       Q.     (By Mr. Boyasian) Mr. Campbell, is there a favorable time  
9       of year in which it would have been likely for them to find a  
10      five- to eight-day window to leave Seattle with conditions that  
11      did not exceed restrictions in the tow plan?

12           MR. SIMMS: Same objection.

13           THE COURT: Mr. Simms, I'll give you a continuing  
14      objection to all of this. All right?

15           MR. SIMMS: Yes, sir.

16           THE COURT: You may respond, Mr. Campbell.

17       A.     Certainly, there is a favorable time of the year. I'm  
18      going to answer it, and then I'll give you an example, if I may?

19           The best time of the year to do it is certainly June, July,  
20      and August, and the weather pattern can be favorable, quite  
21      favorable, in May. September can also be favorable.

22           Now, what I did is, I contacted my office yesterday because  
23      I wanted to get a feeling for how many clients we have that  
24      we're routing right now on the West Coast of the U.S. and where  
25      they are located.

1           So effective July 6th of this year, we had nine clients  
2           located between Oregon and Alaska.

3           I then asked them to go back to 28 days prior to COVID,  
4           because certain places still closed, and find out where we had  
5           clients at that time on the West Coast U.S. on July 6th.

6           We had 11 clients, and they were all located between Oregon  
7           and Washington -- Oregon and Alaska. I'm sorry.

8           I then asked, on October 26th, 2018, how many clients do we  
9           have on the West Coast U.S.? We had seven clients on October  
10          26th, 2018. Only one of them was north of Santa Barbara,  
11          California. That client was in Seattle, had received three  
12          weather window advisories from us prior to October 26th. They  
13          were considering canceling their trip until the next spring.

14          That is very typical for the type of problems we have in  
15          the Pacific Northwest at that time of the year.

16          So the best time to do it, in my opinion, is June, July,  
17          and August. May and September will work, at times, as well.

18                 MR. BOYAJIAN: Thank you, Mr. Campbell. I expect that  
19          Western's counsel will have questions for you, and I may have  
20          some follow-up after, but I'm passing you over.

21                 Thank you.

22                 THE WITNESS: You're welcome.

23                                 CROSS-EXAMINATION

24                 BY MR. SIMMS:

25                 Q.    Mr. Campbell, this is Steve Simms. We got to see each



1 other in person, not long ago, on Zoom.

2 Now, in your report, you talked about towing the Russian  
3 submarine. That's the only tug-and-tow project you have ever  
4 had, right?

5 A. That's the only towboat tow project we've had. Quite  
6 frequently, the motor yachts and some of the larger sailboats,  
7 they'll tow tenders or smaller boats behind them, and when they  
8 do that, there are restrictions for winds and sea state.

9 So the only major tow with a towboat was the Russian  
10 submarine.

11 Q. And you don't, in your work, use NOAA forecasts, right?

12 A. No, we do not use NOAA forecasts because they are  
13 generalized forecasts. Ours are site specific, client specific.

14 Q. And this intergovernmental report, you talked about it, the  
15 copy that came from the University of Iowa, that's not something  
16 relevant to what you do, either, is it?

17 A. No, generally, I don't look at that.

18 When there's a major weather event, something very  
19 important, or when there's conflict between the weather models,  
20 I may look at the intergovernmental discussion. I think  
21 probably the last one I ever looked at was for Hurricane Sandy.

22 Q. And you don't really know what sort of weather reporting a  
23 tug crew typically looks at, do you?

24 A. Personally? No, I don't.

25 MR. SIMMS: All right. Thank you.

1 THE COURT: Any redirect?

2 MR. BOYAJIAN: Just one question, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. BOYAJIAN:

5 Q. When you are routing yachts, is it that you are given a set  
6 of weather conditions that they don't want to exceed and a route  
7 that they would like to get to, and you look for a weather  
8 window?

9 A. That's correct.

10 Q. Would there will be any reason at all that you would answer  
11 a question differently if you saw the weather restrictions in  
12 this case apply to a dry dock and a route that a towboat wanted  
13 to get to at a given speed?

14 A. No. The way I handle projects, I would handle this one  
15 exactly the same way.

16 MR. BOYAJIAN: Okay. Thank you very much,  
17 Mr. Campbell.

18 THE COURT: Mr. Campbell, thank you. That will  
19 conclude your testimony.

20 THE WITNESS: Thank you. Have a good day.

21 THE COURT: Counsel, does that conclude the witnesses,  
22 on behalf of Vigor?

23 MR. BOYAJIAN: It does, Your Honor.

24 THE COURT: Okay.

25 Any other witnesses in rebuttal by Western?

1 MR. SIMMS: No, Your Honor.

2 THE COURT: Both sides are resting?

3 MR. SIMMS: Yes, Your Honor.

4 MR. BOYAJIAN: Yes, Your Honor.

5 THE COURT: All right.

6 Counsel, typically what the court does on bench trials,  
7 like this, is we deal with any legal issues.

8 We have a legal issue outstanding that was raised earlier  
9 today by Mr. Simms, and the court would definitely benefit by  
10 briefing from both sides.

11 Once we take care of that, the next issue would be proposed  
12 findings of fact and conclusions of law, and my typical practice  
13 is then to have you submit those at a future time. The court  
14 can consider them, and then get you back together again, and  
15 allow you some time for closing argument.

16 I understand, Mr. Simms, you're from Baltimore.

17 MR. SIMMS: Yes, Your Honor.

18 THE COURT: And I'd hate to have you fly back out here  
19 again. What we could do is -- we had, basically, figured we had  
20 tomorrow -- at least tomorrow morning -- available for you.  
21 What we could do is allow you to do a brief closing argument  
22 tomorrow morning, give you some time today, rest up for a couple  
23 of hours, and maybe formulate that and keep it -- put it  
24 together in your mind a little bit better. We can do closing  
25 arguments in the morning, and then we can submit the briefing

1 and the proposed findings of fact and conclusions of law, and  
2 you wouldn't have to return.

3 MR. SIMMS: I would prefer to return. Tomorrow is my  
4 anniversary.

5 THE COURT: Smart man.

6 MR. SIMMS: I think, Your Honor, with some clarity,  
7 including on the legal issues, I think closing argument might be  
8 a little bit better.

9 THE COURT: Yes, and that was my concern as well. I  
10 just didn't want you to have to do another trip out here.

11 When can we get the briefing done in terms of supplemental  
12 briefing?

13 MR. SIMMS: Could we have two weeks?

14 THE COURT: Yeah, that would be fine.

15 MR. SIMMS: So that would be the 23rd.

16 MR. BOYAJIAN: Your Honor, if I may ask, is that for  
17 Western to submit initial briefing, and we would have a chance  
18 to respond?

19 THE COURT: Correct. And remember now, I start  
20 probably a month-long trial on the 19th, so I'm going to be tied  
21 up every day for a while.

22 But, no, that would be fine. If you submitted your opening  
23 brief on the 23rd; from Vigor's perspective, how long would you  
24 need to respond?

25 MR. BOYAJIAN: We'd like two, Your Honor.

1 THE COURT: Okay.

2 THE CLERK: That's August 6th.

3 THE COURT: And then, Mr. Simms, if you'd like, not  
4 that there would be any need, but if you'd like, maybe a short  
5 reply to their response.

6 MR. SIMMS: What would work? The 13th or the 20th?  
7 Either is fine.

8 THE CLERK: Typically, it is just a week for a  
9 response. That will be the 13th.

10 MR. BOYAJIAN: Your Honor, do you have any page limits  
11 in mind? You've seen a lot of --

12 THE COURT: Yes, we definitely have that. Follow the  
13 same page limits as we have before, in terms of -- I mean, what  
14 gives me -- what's the most valuable thing for me is if you can  
15 point me to case law once you're making your factual argument.  
16 That's the best on point. It doesn't have to be very long. I'm  
17 not expecting lots and lots of pages on this. In fact, you get  
18 extra credit for having fewer pages.

19 So then here's what I propose: Once we get that, the court  
20 can make a ruling on the legal issue, and then that might help  
21 you in formulating your proposed findings of fact and  
22 conclusions of law. So we'll wait; the court will make a  
23 ruling; get that to you. Once that's done, we'll ask for  
24 findings of fact and conclusions of law, and then we'll schedule  
25 closing argument sometime in August.

1 MR. HOWARD: Your Honor, this is a minor point. If we  
2 get to September, I'll be in a Pierce County trial, so I would  
3 only have Fridays to be able to join you, although I'm sure I'll  
4 have Fridays open.

5 THE COURT: We'll try to get all this done as soon as  
6 we possibly can.

7 Mr. Jarrett?

8 MR. JARRETT: Thank you, Your Honor.

9 So at some point in this case, we had talked about doing  
10 written closing. I thought that that comment had originated  
11 with Your Honor. But if the court prefers to hear verbal  
12 closings, that is, live closings, we could certainly do that,  
13 but we had thought about that, and we were planning to do  
14 written closing. Whatever works best for the court is fine by  
15 us.

16 THE COURT: We can do it by Zoom. I like oral  
17 closings simply because I never know what questions I want to  
18 ask until I hear the argument, and that prevents me from asking  
19 the questions. But we can do it by Zoom so Mr. Simms doesn't  
20 have to come back out.

21 MR. SIMMS: That's fine with us, Your Honor.

22 THE COURT: Or we can have Mr. Gaspich do closing.

23 MR. GASPICH: August 29th, I'm on a plane to Italy,  
24 and I'll be gone for three weeks. So if it's scheduled beyond  
25 that, Mr. Simms will not have local counsel.

1 THE COURT: Thank you for bringing that to my  
2 attention.

3 MR. GASPICH: I could Zoom in, but my strong  
4 preference would be not to.

5 THE COURT: That would be a little tough. It's, like,  
6 a 12-hour time-zone change.

7 MR. GASPICH: I was worried about my wife.

8 MR. HOWARD: I'd submit Mr. Simms might prefer being  
9 here than in Baltimore in August.

10 THE COURT: Exactly.

11 All right. Gentlemen, thank you. It's been very  
12 interesting.

13 If, by any chance, now that all the evidence is in, you  
14 resolve this, let us know as quickly as possible. If you don't  
15 need us to finish all this for you, it would be one less thing  
16 off my desk.

17 So have a good rest of the day, and we'll be seeing you in  
18 the future.

19 (Proceedings adjourned at 1:56 p.m.)  
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## C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 5th day of 2021.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter